320 F.3d 110

(Cite as: 320 F.3d 110)

United States Court of Appeals,

Second Circuit.

ELECTRICAL INSPECTORS, INC.,
Plaintiff-Counter-Defendant-Appellant,

v.

VILLAGE OF EAST HILLS, Village of Roslyn and Village of Oyster Bay Cove,

Defendants-Counter-Claimants,

Village of Islandia, Alexander Pirnie and New York Board of Fire Underwriters,

Defendants-Counter-Claimants-Appellees,

Village of Island Park, Village of Brookville, Village of North Hills, Village

of Flower Hill, Village of Great Neck, Village of Great Neck Estates, Village

of Kings Point, Village of Port Washington North, Village of Sea Cliff, Village

of Saddle Rock and Village of Baiting Hollow,
Defendants.

Docket No. 01-9483.

Argued: June 17, 2002.

Decided: Dec. 13, 2002.

Amended: Jan. 17, 2003.

Before: CALABRESI, SACK, and B.D. PARKER, Circuit Judges.

SACK, Circuit Judge.

This appeal requires us to determine whether the state-action immunity doctrine shields a municipality and a private corporation from alleged federal antitrust-law violations resulting from the municipality's conferral upon the corporation of exclusivity in the market for government-required electrical inspection services within the municipality.

The defendant Village of Islandia (the "Village") is a municipality located on New York's Long Island. In 1988, the Village adopted a policy of requiring building owners to obtain certificates of occupancy from the Village, and conditioning the issuance of such certificates on the positive results of an electrical wiring inspection conducted by the not-for-profit defendant New York Board of Fire Underwriters (the "Board"). Any property owner who wishes to use or occupy a building is required to submit to and pay the Board for the Board's inspection. The plaintiff, a for-profit corporation that also provides electrical inspection services in the State of New York, brought suit against both the Village and the Board in the United States District Court for the Eastern District of New York alleging that this arrangement resulted in violations of the Sherman Act and other federal and state laws. The district court (Leonard D. Wexler, *Judge*) concluded that the Village's policy was authorized by an act of the New York State Legislature, and that the actions of the Village and the Board were therefore exempt from the federal antitrust laws under the state-action immunity doctrine. *Elec. Inspectors, Inc. v. N.Y. Bd. of Fire Underwriters,* 145 F.Supp.2d 271, 279 (E.D.N.Y.2001) ("*EII* ").

We agree with the district court that for purposes of the state-action immunity doctrine, the state authorized the

Village to pass the ordinance that gave the Board exclusivity with respect to the performance of wiring inspections in Islandia. We disagree, however, with the district court's holding that this finding is sufficient in itself to support a dismissal of the plaintiff's federal antitrust-law claims. We conclude that such immunity for the Board against the plaintiff's claim for damages, and possibly for the Village against the plaintiff's claim for equitable relief, requires a finding that government officials actively supervised the Board. We therefore vacate the judgment of the district court and remand the case for further proceedings consistent with this opinion.

BACKGROUND

In 1981, the New York State Legislature enacted the Uniform Fire Prevention and Building Code Act (the "Act"), N.Y. Exec. Law § 370 *et seq.* The Act required the creation of a state-wide uniform fire code for commercial and residential buildings, *id.* § 377, and it directed New York's various local governments to "administer and enforce the uniform ... code," *id.* § 381(2). To facilitate local governments' carrying out of their enforcement responsibilities, the Act directed the New York Secretary of State to "promulgate rules and regulations prescribing minimum standards for administration and enforcement of the uniform ... code," *id.* § 381(1), and gave the Secretary powers to ensure that local governments enforced the code in compliance with the Secretary's regulations, *id.* § 381(4). The Act required the regulations issued by the Secretary to address, *inter alia,* the frequency of building inspections and the number and quality of inspectors. *Id.* § 381(1).

Pursuant to the Act, the Secretary issued regulations providing that any property owner who wishes to use or occupy a commercial or residential building must obtain a certificate of occupancy from a local government body. N.Y. Comp.Codes R. & Regs. tit. 19, § 429(c)(1) (repealed 1996). Local governments, in turn, were forbidden from issuing a

certificate of occupancy for any building unless a designated officer or agent inspected the building's electrical wiring and certified that it complied with the uniform electrical code. *Id.* § 429(b)(1) (repealed 1996). Finally, the Secretary's regulations (later withdrawn) authorized local governments to pass resolutions designating those who would conduct such inspections. The specified options were (1) "a designated officer or employee of the city, town, or village"; (2) "an employee or agent of another city, town, or village who is qualified to conduct such inspections"; (3) "a person who is qualified to conduct such inspections ... pursuant to a contract with the city, town, or village"; (4) "an employee or agent of the county who is qualified to conduct such inspection"; and (5) "a competent inspector, designated or approved by the city, town, or village." *Id.* § 429.2(b)(2)(i)-(iv) (repealed 1996).

Pursuant to those regulations and prior to their repeal, on August 4, 1988, the trustees of the Village passed an ordinance resolving that the Village "accepts [the Board] as its only electrical inspecting agency." Thereafter, the Village required all applicants for certificates of occupancy to present proof that the Board had inspected the electrical wiring in their buildings and certified that it complied with the National Electric Code.[1]

The Board is a not-for-profit corporation that received its charter from the New York State Legislature in 1867.[2] Its members are ninety-six insurance companies authorized to write fire insurance policies in New York. According to an

---

[1]The National Electric Code is "a model code promulgated by the National Fire Protection Association," *Edison Elec. Inst. v. Occupational Safety & Health Admin.*, 849 F.2d 611, 614 (D.C.Cir.1988), which is "an international nonprofit membership organization," *see NFPA Overview, at* http://www.nfpa.org/Home/ AboutNFPA/NFPAOverview/NFPAO verview.asp (last visited December 12, 2002).

[2]On April 1, 1930, the New York State Legislature reconstituted and continued the Board "as a body, corporate and politic, in perpetuity."

affidavit submitted by defendant Alexander Pirnie, the Board's former president,[3] the Board engages in two principal activities: It maintains the New York City Fire Patrol, a group of patrolmen who assist New York City's firefighters, and it inspects electrical equipment and issues certificates of compliance with the National Electric Code. Pirnie Aff. ¶¶ 4, 11. Approximately 250 New York municipalities have adopted policies that, like the Village's, effectively require building owners to obtain certificates of compliance from the Board. *Id.* ¶ 12. The Board charges a fee for inspections to be paid by the property owner.

The plaintiff, Electrical Inspectors, Inc., is a for-profit corporation that, like the Board, inspects electrical wiring in commercial and residential properties in New York State and issues certificates of compliance with the National Electric Code. On March 1, 1999, the plaintiff brought this action in the district court against fifteen New York municipalities including the Village; on September 9, 1999, it amended its complaint to name the Board as a defendant. The plaintiff alleged various violations of the Sherman Act, 15 U.S.C. §§ 1 & 2, the Donnelly Act, N.Y. Gen. Bus. Law § 340(1), its federal due process rights, and its federal and state equal protection rights. According to the amended complaint, the municipalities' policies of conferring monopoly power within their respective boundaries on the Board were unauthorized by state law and had the illegal effect of excluding the plaintiff from local markets for electrical inspection services. Amend. Compl. ¶ 139. The plaintiff also alleged that the Board actively sought and maintained such grants, and abused its exclusive positions by providing low-quality service and by seeking to expand its overall market share by threatening to retaliate in those locations where it has exclusivity against customers who use the plaintiff's services

---

[3]The distinction between the Board and Pirnie is not relevant for purposes of this appeal, and our legal conclusions regarding the Board apply equally to Pirnie.

where competition is allowed. *Id.* ¶¶ 52, 69, 72, 112, 118.[4] The plaintiff sought monetary damages against the Board, and injunctive and declaratory relief against the municipalities, for their asserted violation of the federal antitrust laws.

The defendants assert in their answer, *inter alia,* that they are immune from the plaintiff's federal antitrust-law claims under the state-action immunity doctrine. The plaintiff moved to strike this defense as insufficient pursuant to Federal Rule of Civil Procedure 12(f), and the defendants cross- moved for summary judgment on the federal antitrust law claims.

On March 30, 2001, the district court issued a Memorandum and Order denying the plaintiff's motion to strike and granting the defendants' motion for summary judgment. *EII,* 145 F.Supp.2d at 279. The court held that the municipalities were immune from federal antitrust liability on the grounds that the Act gave them "broad ... authority over a matter integral to public health and safety," and that appointing exclusive agents to conduct required electrical inspections was "a 'foreseeable' consequence of the state delegation of authority." *Id.* at 277-78. The district court then concluded that the municipalities' immunity under the state-action doctrine extended to the Board. "Because the municipal defendants' decisions appointing the Board as exclusive agent are immune from antitrust liability, the Board is similarly immune from antitrust liability as the party receiving those appointments." *Id.* at 279 (citing *Cine 42nd St. Theater Corp. v. Nederlander Org., Inc.,* 790 F.2d 1032, 1048 (2d Cir.1986)).

On September 21, 2001, the plaintiff voluntarily dismissed its federal constitutional claims against the

---

[4]The plaintiff also challenged the legitimacy of the Board's status as a non-profit entity, alleging that the Board's exemption from income taxes enabled it to earn "excess profits" that accrued to the benefit of its for-profit members. Amend. Compl. ¶¶ 45, 113.

municipal defendants. The district court subsequently issued a judgment dismissing with prejudice the plaintiff's federal antitrust-law claims, and dismissing without prejudice the plaintiff's state-law claims for want of supplemental jurisdiction. The plaintiff now appeals, challenging only the district court's dismissal of its federal antitrust-law claims against the Board and the Village.

DISCUSSION

I. Standard of Review

We review a district court's grant of summary judgment *de novo,* construing the evidence in the light most favorable to the non-moving party. *Tenenbaum v. Williams,* 193 F.3d 581, 593 (2d Cir.1999), *cert. denied,* 529 U.S. 1098, 120 S.Ct. 1832, 146 L.Ed.2d 776 (2000). A district court must grant a motion for summary judgment if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law," Fed.R.Civ.P. 56(c), i.e., "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). A fact is "material" for these purposes if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

II. State-Action Immunity for the Village

The Village regulates the usage of local real estate by

requiring all owners of commercial and residential buildings who wish to use or occupy their property to obtain from the Village a certificate of occupancy. In order to do so, for reasons of fire safety, a property owner must, under the Village ordinance, first submit the property to an electrical wiring inspection by the Board, pay the Board's fee, and receive from the Board certification that the wiring complies with the National Electric Code. The plaintiff alleged in its amended complaint that the Village's conferral of such exclusivity on the Board violates, *inter alia,* the Sherman Act, and sought injunctive and declaratory relief.[5] The Village asserts the affirmative defense that its action was pursuant to state policy and thus was exempt from the federal antitrust laws under the state-action immunity doctrine. The district court agreed with the Village. The plaintiff challenges this holding on appeal.

Because the district court granted judgment to the Village on its affirmative defense, neither the standing of the plaintiff under the antitrust laws to make all of the underlying claims it asserts nor the merits of the claims are at issue in this appeal. Our only task with regard to the plaintiff's claims against the Village is to evaluate the district court's conclusion that the Village is immune.

A. Immunity for Municipal Economic Regulation

In *City of Columbia v. Omni Outdoor Adver., Inc.,* 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991) ("*Omni*

---

[5]The plaintiff does not allege that the Village has created a monopoly in the sense that it forbade property owners from hiring the plaintiff. The plaintiff's allegation is, rather, that the Village's requirement that every owner submit a Board-issued certificate of compliance in order to receive a certificate of occupancy effectively eliminated demand for the plaintiff's services. The implicit assumption, which we have no reason to doubt, is that property owners have little need for additional inspection services once they have obtained a certificate of occupancy.

Outdoor "), the Supreme Court addressed state-action immunity for municipal regulatory schemes. There, the City of Columbia, South Carolina, asserted immunity from a claim under the Sherman Act that its restrictions on the size, location, and spacing of billboards hindered the ability of newcomers to compete in the billboard construction market. *Id.* at 367-69, 111 S.Ct. 1344. The Court began its analysis by noting that under the state-action immunity doctrine established by its decision in *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), "the Sherman Act [does] not apply to anticompetitive restraints imposed by the States 'as an act of government.' " *Omni Outdoor,* 499 U.S. at 370, 111 S.Ct. 1344 (quoting *Parker,* 317 U.S. at 352, 63 S.Ct. 307.) The Court explained that the doctrine is grounded in "principles of federalism and state sovereignty." *Omni Outdoor,* 499 U.S. at 370, 111 S.Ct. 1344. Local governments are not sovereign, and so their actions are not automatically immune under *Parker. Omni Outdoor,* 499 U.S. at 370, 111 S.Ct. 1344. Nonetheless, because states sometimes effect regulatory regimes through local government bodies, municipalities may avail themselves of *Parker* immunity to the extent their actions are "an authorized implementation of state policy." *Id.*

The Court held that municipalities that wish to avail themselves of *Parker* immunity must show that their regulations were authorized by the state. The requisite showing of authority has two components: First, the municipality must have "authority to regulate"; second, it must have "authority to suppress competition." *Id.* at 372, 63 S.Ct. 307; *accord Hertz Corp. v. City of New York,* 1 F.3d 121, 128 (2d Cir.1993) (holding that under *Parker* a municipality must establish that "the resulting anticompetitive activities are a foreseeable consequence of [a] state delegation" (quoting *Cine 42nd St. Theater Corp. v. Nederlander Org., Inc.,* 790 F.2d 1032, 1043 (2d Cir.1986) ("*Cine* ")), *cert. denied,* 510 U.S. 1111, 114 S.Ct. 1054, 1054, 127 L.Ed.2d 375 (1994).

To determine whether the City of Columbia had "authority to regulate," the Supreme Court looked to the terms of the relevant South Carolina statutes. *Omni Outdoor,* 499 U.S. at 371, 111 S.Ct. 1344. At the same time, the Court held that federal courts, when determining state-action immunity for municipalities, must "adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law." *Id.* at 372, 111 S.Ct. 1344. This broader concept of authority is necessary, the Court explained, because a doctrine of state-action immunity that "transform[ed] state administrative review into a federal antitrust job" would undermine "the very interests of federalism [the *Parker* doctrine] is designed to protect." *Id.* at 372, 111 S.Ct. 1344 (citation omitted). For this reason, the Court held, the inquiry into a municipality's authority to regulate should not be exacting. *Id.* at 371, 111 S.Ct. 1344. The Court went on to decide that language in the South Carolina statute authorizing local governments to regulate the height and size of "structures" constituted sufficient authority for the City of Columbia's billboard regulations. *Id.* at 372-73 & n. 4, 111 S.Ct. 1344. Although the statute also provided that municipal ordinances were valid only if they served "the purpose of promoting health, safety, morals or the general welfare of the community," the Court declined to inquire whether the city's ordinance fulfilled this requirement. *Id.* at 370 n. 3, 371-73, 111 S.Ct. 1344 (citation and internal quotation marks omitted). The Court's decision not to inquire as to whether Columbia's ordinance was actually authorized by state statute suggests that as long as the local enactment is within a broad view of the authority granted by the state, whether it is actually violative of that statute is a question for state authorities, not one of federal antitrust law.

With regard to the second component of the inquiry, i.e., whether the City of Columbia had "authority to suppress competition," the Supreme Court began by "reject[ing] the contention that this requirement can be met only if the

delegating statute explicitly permits the displacement of competition." *Id.* at 372, 111 S.Ct. 1344. Instead, the Court held, the requirement is met "if suppression of competition is the 'foreseeable result' of what the statute authorizes." *Id.* (quoting *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 42, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985)). The Court then asked whether a logical relationship existed between the purpose of the state statute and its alleged anticompetitive effect, and observed that "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." *Omni Outdoor,* 499 U.S. at 373, 111 S.Ct. 1344. On this basis, the Court concluded that suppression of competition was a foreseeable result of the South Carolina statute, and thus that the City of Columbia had met the requirements for immunity for its regulatory scheme. *Id.* at 374, 111 S.Ct. 1344.

The Supreme Court's analysis in *Omni Outdoor* mirrored the approach that this Court had followed in *Cine.* There we examined the actions of the New York "Urban Development Corporation," or "UDC," a public entity designed by the New York State Legislature "to make the State an active participant in the financing and construction of urban renewal projects." *Cine,* 790 F.2d at 1036. The UDC purchased theaters in the Times Square area of New York City and then awarded leases on them to private developers, prompting parties whose applications for leases had been rejected to bring suit under the Sherman Act against both the UDC and the winning bidders. *Id.* at 1037-38. The defendants claimed state-action immunity. *Id.* at 1038.

We began our analysis by holding that because the UDC was a "political subdivision of the state," it was like a municipality for purposes of the *Parker* doctrine. *Cine,* 790 F.2d at 1047. We then concluded that in order to qualify for state-action immunity, the UDC was required to "show [1]

that it acted pursuant to a clearly expressed state policy and [2] that the resulting antitrust consequences were reasonably contemplated by the state." *Id.* at 1047-48.

With regard to the first component, we found authority for the UDC's actions in language in the UDC's enabling statute that specifically empowered it to purchase, and issue leases on, real property. *Id.* at 1045. Under the second component, we concluded that harm to some businesses around Times Square was a foreseeable consequence of the creation of an entity whose purpose was to improve a blighted urban area:

> It is fair to conclude that the legislature contemplated that when it granted power to the UDC to determine what buildings and services would be provided in a particular redeveloped land use project, it knew those choices would affect businesses and residences in that entire area. Such a conclusion is based on common sense. As a result of cultural improvements, rents and property values would increase even though some competitors would be adversely impacted, and some would disappear.

Id. at 1047. On this basis, we held that the UDC had shown sufficient state authority for its actions, and thus was immune under the *Parker* state-action immunity doctrine.

B. The New York Act and the Village Ordinance

The Village argues that its actions effectively excluding the plaintiff from the market for electrical inspections within its boundaries were authorized by the Act and related regulations issued by the New York Secretary of State. To evaluate the Village's defense, we follow the two-step inquiry set forth and applied in *Omni Outdoor* and *Cine.*

1. Step One: Authority to Regulate. The Village cites two provisions of the Act for its authority to regulate: § 381, which provides that "every local government shall

administer and enforce the uniform fire prevention and building code"; and § 371, which states that "it shall be the public policy of the state of New York" to "[e]ncourage local governments to exercise their full powers to administer and enforce the uniform code." N.Y. Exec. Law §§ 381(2), 371(2)(d). The Village also cites for support the regulations issued pursuant to the Act by New York's Secretary of State.

The plaintiff disagrees that the Act confers any new powers on New York municipalities that they do not already have, and argues that the statutory language cited by the Village merely directs local governments to apply to a particular purpose powers arising from other statutory sources. If the plaintiff's interpretation of the Act is correct, then the state-action immunity defense is unavailable because the Village has not identified any other specific statutory source of regulatory power, and the principle is well established that a municipality may not fall back on its general police or "home-rule" powers to immunize anticompetitive regulations. *See Cmty. Communications Co. v. City of Boulder,* 455 U.S. 40, 56, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982); *Hertz,* 1 F.3d at 128.

If the Village had only the language of the Act to rely upon, its authority for purposes of the *Parker* doctrine might be subject to doubt. The cited provisions can be read as no more than a direction to New York State municipalities as to how to act, in contrast with statutory language relied on by municipalities in cases in which they have been held to be immune where a similar direction was coupled with an explicit conferral of regulatory power. *See Omni Outdoor,* 499 U.S. at 370-71 n. 3, 111 S.Ct. 1344 (South Carolina statute providing that "the legislative bod[ies] of cities and incorporated towns may by ordinance regulate ... buildings and other structures"); *Cine,* 790 F.2d at 1045 (New York statute empowering the UDC "to acquire ... real, personal or mixed property[,] and to sell ... [or] lease ... the same").

We conclude, however, that the regulations issued by the Secretary soon after the passage of the state statute

make clear that even if the Village's ordinance was not actually authorized by the state statute itself, it was within the broad grant of state authority. The Secretary's regulations authorized municipalities to condition occupation and use of a building on the result of an electrical inspection, and "by resolution provide that such inspection shall be performed by [an] inspector, designated or approved by the ... town." N.Y. Comp.Codes R. & Regs. tit. 19, § 429(b) (repealed 1996). The regulations appeared to interpret the statute to authorize the Village, or at least to authorize the Secretary to authorize the Village, to do precisely that which the Village has done.[6]

We think that the Act, combined with the Secretary's apparent interpretation of it, sufficiently demonstrates the Village's broad "authority to regulate" for purposes of state-action immunity. The Village has cited statutory language that, although perhaps ambiguous on the question, can be interpreted as delegating a power to regulate, and it has cited regulations issued by the agency charged with enforcing the statute that confer a power to regulate in plain language. Even though those regulations were subsequently withdrawn, they establish the Village's contention that its action was within the broad authority to regulate granted by the state statute itself. Under the broad concept of authority that principles of federalism compel us to apply, we conclude that these sources are sufficient for purposes of *Parker* state-action immunity analysis.

2. Step Two: Authority to Suppress Competition. We also conclude that the Act and the Secretary's

---

[6]While, under the principles announced *Omni Outdoor*, it is not for us as a federal court of appeals to decide on this appeal whether the Village's acts are *ultra vires*, neither do we decide that had a state court determined that the acts were *ultra vires*, we would nonetheless conclude that the municipality or the private actor was entitled to state-action immunity.

regulations establish the second component of authority that municipalities must show under *Parker*. The specific anticompetitive harm that the plaintiff alleges results from the Village's actions is the plaintiff's complete exclusion from the market for required electrical inspection services. We think that such exclusion is a foreseeable result of a statute that requires municipalities to enforce a uniform fire code and administrative regulations that condition the issuance of certificates of occupancy upon inspections by town-designated agents. "[C]ommon sense," *Cine,* 790 F.2d at 1047, indicates that a municipality in the course of enforcing a fire code is likely, for quality control purposes, to limit the set of persons who may issue certificates of compliance, "even though some competitors would be adversely impacted," *id.* And common experience indicates that municipalities often use their own employees to enforce a variety of public codes, such as food preparation or building codes, thereby effectively conferring upon *themselves* exclusivity in the market for required inspection services at a cost to private entities that would perform the same services. The Secretary specifically authorized such town-operated monopolies. N.Y. Comp. R. & Regs. tit. 19, § 429.2(b)(I) (repealed 1996). Such a regime also appears to be contemplated by the section of the Act that provides that "[l]ocal governments or counties may charge fees to defray the costs of administration and enforcement," N.Y. Exec. Law § 381(2). Thus, complete exclusion of a potential competitor in the market was foreseeable.

The plaintiff argues that even if a town-operated monopoly was foreseeable, the designation of a private party as the party enjoying exclusivity was not. We think, however, that the plaintiff's argument misunderstands the nature of the foreseeability inquiry. Our task in assessing the second component of authority identified in *Omni Outdoor* is to determine whether the state intended or at least could have contemplated that its policy would result in "suppression of competition." 499 U.S. at 373, 111 S.Ct. 1344; *accord Cine,* 790 F.2d at 1047. Whom the municipality selected as the

party exercising exclusivity is at best tangential to the inquiry into the foreseeability of suppression of competition. By definition, the creation of a monopoly suppresses--indeed eliminates--all competition in that locality, and in this sense the degree of suppression is the same whether the party exercising the power arising out of exclusivity is public or private. The foreseeability inquiry requires us to go no further. *See Cine,* 790 F.2d at 1045-46 (identifying the relevant question as whether the UDC's entry into leases with private parties was foreseeable, and not inquiring into the foreseeability of its selection of any party in particular). We therefore conclude that the suppression of competition resulting from the Village's actions was a foreseeable consequence of what the state authorized.

C. The Supervision Issue with Regard to the Village

Before we can decide whether the Village is immune from the plaintiff's claims, however, we must confront yet one more issue. The plaintiff argues that for a municipality to be immune under the *Parker* state-action immunity doctrine, it must show, in addition to state authority for its regulatory scheme, that government officials actively supervise those private parties whom the municipality regulates.

Whether a municipality must make such a showing appears to be an open question. The Supreme Court held in *Town of Hallie* that a municipality need not show that it is supervised by state officials for it to qualify for state- action immunity. 471 U.S. at 46, 105 S.Ct. 1713. But the Supreme Court also indicated that "[w]here state or municipal regulation by a private party is involved, ... active state supervision must be shown, even where a clearly articulated state policy exists." *Id.* at 46 n. 10, 105 S.Ct. 1713. This raises the question of whether a failure to show active supervision of a private party can defeat *both* the municipality's claim of immunity *and* the private party's, or

only the private party's. We are not aware of any decision that squarely addresses this issue.

The law regarding the active supervision requirement has developed almost entirely in the context of claims against private parties. We will therefore return to the question of whether the Village's immunity might depend upon a showing that the Board is actively supervised by the Village after we review the plaintiff's claims against the Board.

III. The Board's State-Action Immunity Defense

The plaintiff alleged in its amended complaint that the Board violated the Sherman Act by willfully seeking and maintaining monopolies in various New York municipalities, and by abusing its monopoly power by providing low-quality service and by attempting to expand its overall market share by threatening retaliatory action against those persons who use the plaintiff's service where competition is allowed. The district court, citing our decision in *Cine,* held that the municipalities' immunity under the *Parker* doctrine necessarily also protected the Board: "Because the municipal defendants' decisions appointing the Board as exclusive agent are immune from antitrust liability, the Board is similarly immune from antitrust liability as the party receiving those appointments." *EII,* 145 F.Supp.2d at 279. The plaintiff argues on appeal that the district court misapplied the law of state-action immunity for private parties.[7] The Board argues that the district court's holding

---

[7]The plaintiff also argues that the decision of New York Supreme Court, Broome County, in *Atlantic-Inland v. Town of Union,* 126 Misc.2d 509, 516, 483 N.Y.S.2d 612, 618, collaterally estops the Board from asserting a state-action immunity defense in this case. The fact pattern of *Atlantic-Inland* was similar to that of the instant case: An electrical inspection firm, alleging violations of its constitutional rights and New York antitrust law (i.e., the Donnelly Act), sued a municipality that had designated the Board its exclusive provider of required electrical inspections. The Board intervened on the side of the municipality. The

was correct, and in the alternative that under the *Noerr-Pennington* doctrine, certain allegations by the plaintiff fail to allege an antitrust injury.[8]

A. The State-Action Defense for Private Actors

There are circumstances under which private parties may avail themselves of the *Parker* state-action immunity doctrine. The Supreme Court has explained the purpose of extending state-action immunity to private parties thus:

> The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce. If *Parker* immunity were limited to the actions of public officials, this assumed congressional purpose would be frustrated, for a State would be unable to implement programs that

---

court entered judgment against the defendants, holding that "the [municipality's] ordinance is anticompetitive and an unwarranted monopoly in violation of the Donnelly Act." *Id.* at 517, 483 N.Y.S.2d at 618. Although the court's opinion in *Atlantic-Inland* does not mention the state-action immunity defense, the plaintiff argues that the Board could have raised the defense in that case, and so its defeat precludes it from raising the defense now. The plaintiff's collateral estoppel argument fails as a matter of law. Unlike the federal antitrust laws, the Donnelly Act contemplates no state- action exception. *Elec. Inspectors, Inc. v. Village of Lynbrook*, 293 A.D.2d 537, 538, 740 N.Y.S.2d 412, 413 (2d Dep't 2002). Thus, even if the Board raised state-action immunity in *Atlantic-Inland*, rejection of that defense was not necessary to the disposition, and so that case does not preclude the Board from raising the defense here. *See Fuchsberg & Fuchsberg v. Galizia*, 300 F.3d 105, 109 (2d Cir.2002) (collateral estoppel applies only to issues necessarily resolved in previous proceeding).

[8]In a supplemental brief that we requested at oral argument, the Board asserted for the first time a defense under the Local Government Antitrust Act of 1984, 15 U.S.C. § 34 *et seq.* Because the Board did not raise the defense in its principal appellate brief, the Board has abandoned the defense and we do not consider it. *See, e.g., Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir.1999).

> restrain competition among private parties. A plaintiff could frustrate any such program merely by filing suit against the regulated private parties, rather than the state officials who implement the plan. We decline to reduce *Parker* 's holding to a formalism that would stand for little more than the proposition that [the plaintiff] sued the wrong parties.

S. Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 56-57 (1985) (footnote omitted) ("*Motor Carriers*").

In *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), the Supreme Court established that private parties must satisfy a two-prong test to qualify for state-action immunity. First, the private party must show that the alleged anticompetitive acts were pursuant to a "clearly articulated and affirmatively expressed ... state policy" to displace competition. *Id.* (citation and internal quotation marks omitted). Second, it must show that its conduct was "actively supervised by the State itself." *Id.* (citation and internal quotation marks omitted).

More recently, the Supreme Court made clear that the first prong of the *Midcal* test is not as demanding as the Court's statement of it in *Midcal* suggests. It does not, for example, require a private party to show " 'a specific, detailed legislative authorization' for its challenged conduct." *Motor Carriers,* 471 U.S. at 64, 105 S.Ct. 1721 (quoting *Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 415, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978)). Rather, "[a]s long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied." *Motor Carriers,* 471 U.S. at 64, 105 S.Ct. 1721. For example, in *Motor Carriers* itself, the Court held that a private party accused of horizontal price fixing had satisfied the first prong of *Midcal* by showing that a state legislature had instructed a state agency to prescribe "just and reasonable" prices, and the agency, in turn, had "exercised its discretion by actively

encouraging collective ratemaking." *Id.* at 63-64.

Under the second prong of the *Midcal* test--active state supervision--a private defendant must show not only that "state officials have ... [the] power" to supervise, but also that those officials "exercise [that] power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick v. Burget,* 486 U.S. 94, 101, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988). This requirement of official involvement seeks to prevent states from transforming the *Parker* doctrine, designed to accommodate the states' sovereign interest in regulating commerce, into an unbounded license for the states to issue Sherman Act exemptions to private parties. *See Motor Carriers,* 471 U.S. at 57, 105 S.Ct. 1721 ("Th[e] supervision requirement prevents the State from frustrating the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." (quoting *Midcal,* 445 U.S. at 106, 100 S.Ct. 937)); *Parker,* 317 U.S. at 351, 63 S.Ct. 307 ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."). This second part of the *Midcal* test thus serves as a counterweight to the first because it "ensure[s] that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick,* 486 U.S. at 100-01, 108 S.Ct. 1658.[9]

---

[9]Municipalities need not show that the state actively supervises them for them to be immune with regard to their own anticompetitive behavior under the *Parker* doctrine because "there is little or no danger that [a municipality] is involved in a *private* price-fixing arrangement." *Town of Hallie,* 471 U.S. at 47, 105 S.Ct. 1713 (emphasis in the original). "The only real danger is that [the municipality] will seek to further purely parochial public interests at the expense of more overriding state goals." *Id.* By way of contrast, when "a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State."

The Supreme Court's most recent decision applying the active supervision prong is *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). There, the Court held that arrangements whereby states authorized horizontal price fixing among insurance companies, but required the companies to file collective tariffs that state agencies had the option to reject, lacked sufficient state supervision to qualify for immunity. *Id.* at 639, 112 S.Ct. 2169. To fulfill the active supervision prong, the Court held, private parties must prove that state officials "have undertaken the necessary steps to determine the specifics" of the regulatory regime; a mere "negative option" among state agencies to reject prices proposed by private parties is insufficient. *Id.* at 638-39, 112 S.Ct. 2169. "The mere potential for state supervision is not an adequate substitute for a decision by the State." *Id.* at 638, 112 S.Ct. 2169.

The Supreme Court followed a similar approach in *Patrick*, a case that involved an accusation by a physician that a group of his peers had conspired to deprive him of hospital privileges in violation of the Sherman Act. 486 U.S. at 97-98, 108 S.Ct. 1658. Although the defendants presented evidence of state policies encouraging physician peer review, the Court rejected their immunity claims because they had failed to show that state actors actively reviewed "private decisions regarding hospital privileges to determine whether such decisions comport[ed] with state regulatory policy and to correct abuses." *Id.* at 101, 108 S.Ct. 1658.

Although the Supreme Court has applied the two-part *Midcal* test in each of its subsequent cases involving an assertion of state-action immunity by a private party, we have twice declined to engage in an independent immunity inquiry for a private party whose alleged anticompetitive conduct was to participate in "concerted" action with a government entity authorized by the state to take such action. Our first decision in this line was *Cine*, a case which,

---

Id.

as discussed in Part II.A., above, involved efforts by a state-created entity, the UDC, to improve the Times Square area by purchasing theaters and then leasing them to developers. Although the *Cine* plaintiffs asserted that "collusive and monopolistic" pricing policies would result from the coordinated action between the UDC and the private-party defendants, the only anticompetitive conduct alleged by the plaintiffs to be illegal was the private parties' seeking, and the UDC's awarding, long-term leases on theaters. 790 F.2d at 1037-38; *see also Cine 42nd St. Theater Corp. v. Nederlander Org.*, 609 F.Supp. 113, 119 (S.D.N.Y.1985), *aff'd*, 790 F.2d 1032 (2d Cir.1986) (setting forth the plaintiffs' contentions). After concluding that the UDC's actions were fully authorized by New York State and therefore immune, we held that such immunity extended automatically to the "private [parties] acting in concert with the UDC." *Cine*, 790 F.2d at 1048. We explained that "[w]hen the UDC accomplishes its goal in a protected manner, and the participation of private third parties was reasonably contemplated by the legislature, allowing successful tangential attacks on the UDC's activities through suits against the third parties would effectively block the efforts of the UDC." *Id.*

Our second such decision was *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59 (2d Cir.1998), which involved alleged antitrust-law violations arising from contracts between a state-operated waste-disposal entity and private waste-disposal companies promising to honor each other's exclusive service agreements with various towns. *Id.* at 63. After concluding that the state agency's actions were authorized under a state statute and thus immune from federal antitrust-law liability, we held, relying on *Cine*, that the private companies were also immune because "[s]ubjecting them to antitrust liability would effectively block [the state entity's] efforts to carry out its mandate through contracts with private parties." *Id.* at 74. As in *Cine*, the only anticompetitive actions allegedly taken by the private-party defendants were those of

contracting with the state-created entity. *Id.* at 71.

The Board argues on appeal that the Supreme Court's decision in *Ticor* and ours in *Cine* and *Wheelabrator* stand for the proposition that the active state-supervision test of *Midcal* is applicable only in horizontal price- fixing cases. We disagree. With regard to *Ticor,* the Supreme Court did not limit *Midcal* to any particular form of private anticompetitive conduct, but instead simply cautioned that its holding that the private defendants were not immune "should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision." 504 U.S. at 639, 112 S.Ct. 2169. Four years before *Ticor,* moreover, the Supreme Court, without dissent, applied the active supervision prong in *Patrick,* a case that had nothing to do with price fixing. 486 U.S. at 100, 108 S.Ct. 1658.[10]

We think that *Cine* and *Wheelabrator,* rather than departing from the logic of *Midcal* and subsequent Supreme Court precedent, are consistent with it. We decided in both cases that the governmental entities were authorized to engage in contracting with private parties, establishing that the first prong of *Midcal* was satisfied with regard to the private parties' actions. We then went on to extend that immunity to the private parties, reasoning that to allow suits against private parties who contract with governmental entities, who are themselves authorized to contract with private parties, would effectively undermine the governmental entities' ability to contract. *Wheelabrator,* 155 F.3d at 74; *Cine,* 790 F.2d at 1048. The private parties are the necessary counterparts to the government's acts, and authorization of the government's contracting therefore necessitates authorization of the private parties' contracting.

---

[10]While we suggested in *Wheelabrator* that *Ticor* might apply only where private horizontal price fixing is in issue, *Wheelabrator,* 155 F.3d at 74, *Patrick* makes clear that that is not the case, *Patrick,* 486 U.S. at 100, 108 S.Ct. 1658.

In extending immunity from governmental entities to private parties where the only alleged antitrust violation was entering into a contract with the government, these decisions do not go through a separate *Midcal* analysis. But, as the Supreme Court observed in *Town of Hallie*, "[w]here the actor is a municipality, there is little or no danger that it is involved in a *private* ... arrangement." 471 U.S. at 47, 105 S.Ct. 1713. The private actions "in concert" with the governments' in *Cine* and *Wheelabrator* were part of an "anticompetitive scheme [that was] the State's own," *Ticor*, 504 U.S. at 635, 112 S.Ct. 2169, thus satisfying the concern that the second *Midcal* prong--active supervision--was designed to address.

Cine and *Wheelabrator* do not stand for the proposition that private parties who contract with governmental agencies are always immune from antitrust liability. As the Supreme Court has made clear, the relevant object of analysis under the state-action immunity doctrine is the activity challenged, not the identity of the party. *Motor Carriers*, 471 U.S. at 58- 59, 105 S.Ct. 1721 ("The success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant."). In *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573 (2d Cir.2000), which involved an assertion of federal-action immunity from antitrust-law claims by a private party that had contracted with a federal agency, we applied *Motor Carriers* to conclude that the private party was immune for conduct "compelled by the explicit terms" of its contract and the government's explicit direction. *Name.Space*, 202 F.3d at 582. At the same time, however, we observed that the private party's "mere status as a government contractor does not entitle it to antitrust immunity for all its conduct," *id.* at 581, reinforcing the notion that the relevant unit of analysis is the activity challenged, not the status of the party. The suspension of the requirement for an independent immunity inquiry for the private parties in *Cine* and *Wheelabrator*, therefore, should be understood to apply only to their acts of

contracting with an authorized government entity.

B. The Board's Actions

We now consider each of the Board's actions that the plaintiff alleges violate the Sherman Act. We note at the outset that, perhaps with *United States v.Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir.1945) (Hand, J.), and its observation that a person does not violate the antitrust laws when it has monopoly "thrust upon it" in mind, the plaintiff does not assert that the Board violated the Sherman Act merely because the Village passed an ordinance according it exclusivity within the Village. Instead, the plaintiff's claim is that the Board actively sought and abused monopoly power.

We conclude that the district court erred by holding that our decision in *Cine* relieved the Board of the need to satisfy *Midcal's* two-prong test to qualify for state-action immunity. None of the Board's alleged anticompetitive conduct involved acts of contracting with a governmental entity authorized to enter into contracts with private parties. Municipal ordinances, not contracts, created the monopolies within the municipalities at issue in this case. Moreover, when the Board conducts an inspection, or allegedly threatens those who hire the plaintiff, it is engaging in transactions or seeking to engage in transactions with other private parties, not the Village. "[T]he nature of the activity challenged," *Motor Carriers,* 471 U.S. at 58, is private, and therefore poses the danger of reflecting the Board's "own interests, rather than the governmental interests of the State," *Patrick,* 486 U.S. at 101, 108 S.Ct. 1658.

We therefore hold that *Cine* and *Wheelabrator* have no application in this regard to the Board's conduct, and state-action immunity is available for the Board's alleged acts in restraint of trade in violation of Section One of the Sherman Act only if it can satisfy *Midcal's* two-prong test. With respect to the Board's alleged continuing

monopolization of electrical inspection services in violation of Section Two of the Act and the plaintiff's assertion that the Board is left free by the Village to use its power of exclusivity to determine the price, terms, and quality of its services, the Board must meet both parts of the *Midcal* test--including active supervision by the Village--to warrant protection under the state-action immunity doctrine. The Village "may not confer antitrust immunity"--including immunity from such charges of monopolization--" on private persons by fiat." *Ticor,* 504 U.S. at 633, 112 S.Ct. 2169 (citing *Midcal,* 445 U.S. at 105, 100 S.Ct. 937). Unless the Village maintains "ultimate control" over the monopoly it created, "there is a real danger that [the defendant] is acting to further [its] own interests, rather than the governmental interests of the State." *Town of Hallie,* 471 U.S. at 47, 105 S.Ct. 1713.

1. The First Part of the Midcal Test. We concluded in Part II.B., above, that the Village's conferral of exclusivity upon the Board was "an authorized implementation of state policy." *Omni Outdoor,* 499 U.S. at 370, 111 S.Ct. 1344. We think that this holding also satisfies the first prong of the *Midcal* test for the Board to the extent that the Board's alleged anticompetitive actions were "pursuant" to the grant of exclusivity. *Town of Hallie,* 471 U.S. at 40, 105 S.Ct. 1713. The plaintiff's amended complaint alleges anticompetitive actions by the Board in municipalities other than the Village, suggesting that the first prong of the *Midcal* test for purposes of these actions would depend on the authority of these other municipalities to confer monopoly powers upon the Board. On appeal, however, the plaintiff has not raised arguments addressing these municipalities' authority as distinct from the Village's, and so we assume that our analysis of the Village's authority applies equally to these other municipalities for the limited purpose of assessing the Board's satisfaction of the first prong of *Midcal.*

The plaintiff also alleges that the Board attempted to

monopolize inspections services by seeking government-issued exclusivity. Amend. Compl. ¶¶ 55, 84. Because these actions were not *pursuant* to state policy, but rather *in pursuit* of it, they do not appear to qualify for *Parker* immunity. They may, however, be protected under the *Noerr-Pennington* doctrine. *See Omni Outdoor,* 499 U.S. at 379-80, 111 S.Ct. 1344 (holding that the Supreme Court's decisions in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *Mine Workers v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), establish that "[t]he federal antitrust laws ... do not regulate the conduct of private individuals in seeking anticompetitive action from the government"). We leave any analysis of this issue to the district court in the first instance on remand.

The Board's alleged poor service and retaliatory threats within the Village, if they occurred, unlike the Board's alleged action in lobbying for exclusivity, were *pursuant* to the exclusivity granted to the Board in the sense that the Board's insulation from competition would have lent these actions much of their capacity to harm. We thus conclude that these alleged actions pass the first part of the *Midcal* test.[11] Further inquiry into whether the Board is immune with respect to them must be conducted under the second part of the *Midcal* test: whether there was adequate active supervision of the Board.

---

[11]The plaintiff also alleges that the Board has sought to improperly extend use of its monopoly power into localities that have not made it the exclusive provider of inspection services, by threatening customers who use plaintiff's services where they are salable with retaliation in those localities in which the Board has been granted exclusivity. Amend. Compl. ¶¶ 69-72. We leave it to the district court on remand to determine in the first instance whether such actions, if they occurred, were without state-action immunity because they were not reasonably foreseeable anticompetitive effects of the authorized implementation of state policy, or otherwise.

2. The Second Part of the Midcal Test. With respect to the active state supervision part of the *Midcal* test as applied to the Board's remaining alleged anticompetitive conduct, the Board argues in the alternative that adequate supervision was present. In support, the Board cites an affidavit in which the Village's mayor asserts that the Village's building department "maintained strict controls over the inspections" by "establishing policies as to the manner in which the electrical inspections were carried out ... [,] enforc[ing] the requirement that all inspectors ... possess the appropriate qualifications ... [and] provid[ing] guidance to the inspectors as to how to proceed." Mayor Frank Falco Aff. ¶ 11. The mayor also asserts in his affidavit that the Village could have replaced the Board at any time by resolution had it become dissatisfied with the Board's services. *Id.* ¶ 16.

As we have noted, the district court did not determine whether the Board was actively supervised, holding instead that this part of the *Midcal* test need not be met. We decline to decide this heavily factual issue in the first instance on the record before us. We note that in this context that the Village's mere "negative option" to replace the Board at any time is alone likely inadequate supervision, *Ticor,* 504 U.S. at 638 (noting that supervision must be "active"), and leave to the district court on remand the determination in the first instance of what degree or kind of supervision is adequate and suffices for the Board's assertion of immunity to succeed.

IV. The Village's Immunity--Redux

We now return to the question we left unanswered in Part II.C., above: whether the Village's immunity, like the Board's, depends upon a showing that the Board is actively supervised. As we indicated, we are unaware of an opinion of the Supreme Court or of this Court that has squarely addressed this issue. We note that the Supreme Court has never held that a state's failure to supervise a regulated private party can deprive the state of immunity under

Parker, even though such a failure can result in liability for the private party. The federalism-based concerns underlying state immunity from an antitrust action seem to us less pressing in this case than in the immunity cases the Court and we have decided, however, in part because the Village is not a sovereign, and in part because the plaintiff seeks only injunctive and declaratory relief against the Village. An injunction might be an appropriate device for blocking municipal regulatory regimes that result in significant anticompetitive action by private parties and that constitute nothing more than a "gauzy cloak of state involvement." *Midcal*, 445 U.S. at 106.

But the question of the need for an injunction will arise in this case only if the district court ultimately determines that the Board is not actively supervised and thus not immune, and that there has in fact been a violation of the antitrust laws. We therefore decline to decide this issue since it may prove unnecessary to the disposition of the case. If the district court determines on remand that supervision is lacking, that antitrust violations have occurred, and that a damages award against the Board would be inadequate to deter future harms, it may consider for the first time whether the *Parker* antitrust immunity doctrine would allow an injunction to issue against the Village even though the Village's actions were authorized by the state.

V. Caveat

It bears both repetition and emphasis that we have done no more than decide that, on the record before us, the defendants are not entitled to *Parker* state-action immunity as a matter of law. Nothing we have said should be read to imply any views as to the plaintiff's standing under the antitrust laws to raise all of the issues with respect to which it pleads in its amended complaint or as to the possible ultimate merits of its legal claims.

CONCLUSION

For the foregoing reasons, we vacate the judgment of the district court, and remand the case for further proceedings consistent with this opinion.

145 F.Supp.2d 271
(Cite as: 145 F.Supp.2d 271)

United States District Court
Eastern District of New York

ELECTRICAL INSPECTORS, INC., Plaintiff,

v.

THE NEW YORK BOARD OF FIRE UNDERWRITERS, et al., Defendants.

No. CV 99-1138.

March 30, 2001

WEXLER, J.:

Plaintiff Electrical Inspectors, Inc. ("EII") brings this action against defendants Alexander Pirnie ("Pirnie") and the New York Board of Fire Underwriters (collectively, the "Board"), and the Village of Oyster Bay Cove ("Oyster Bay Cove") and the Village of Islandia ("Islandia") (collectively, the "municipal defendants")[1] asserting, in its amended complaint, claims for violations of §§ 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (the "federal antitrust claims"), and New York's Donnelly Act, N.Y. Gen. Bus. Law § 340(1) (the "Donnelly Act claims"), as well as federal claims for violation of due process and equal protection and various supplemental state law claims. In response to the amended complaint, defendants assert, inter alia, that they are shielded from liability under federal antitrust laws by the "state action immunity" doctrine. Before the Court are EII's

---

[1]EII also named the Village of East Hills ("East Hills") as a defendant, but the action has since been discontinued as against East Hills.

motion pursuant to Rule 12(f) of the Federal Rules of Civil Procedure to strike defendants' state action immunity defenses, and Islandia's and the Board's cross-motions pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment dismissing various claims, including the federal antitrust claims. For the reasons below, EII's motion is denied and defendant Board's and Islandia's motions are granted.

I. BACKGROUND

In 1981, the New York State legislature confronted the persistent problem and danger to person and property from fire resulting from the lack of a "single, adequate, enforceable code establishing minimum standards for fire protection" in the construction and maintenance of buildings in the state by enacting the Uniform Fire Prevention and Building Code Act, N.Y. Exec. Law § 370 et. seq. (McKinney 1993) (the "Act"). The Act declared, inter alia, that "it shall be the public policy of the state of New York" to: "[i]mmediately provide for a minimum level of protection from the hazards of fire in every part of the state"; "[p]rovide for the promulgation of a uniform code addressing building construction and fire prevention"; "[i]nsure that the uniform code be in full force and effect in every area of the state"; "[e]ncourage local governments to exercise their full powers to administer and enforce the uniform code"; and "[p]rovide for a uniform, statewide approach to the training and qualification of personnel engaged in the administration and enforcement of the uniform code." Id. § 371(2)(a)-(e). The Act prescribed standards for the drafting, by an appointed council, of a "Uniform Fire Prevention and Building Code" (the "Code"). Id. §§ 374-78. The Act also directed the Secretary of State to "promulgate rules and regulations prescribing minimum standards for administration and enforcement of the [Code]." Id. § 381.

Electrical code compliance inspections are used to ensure that electrical work has been done properly, to minimize the

risks associated with malfunctioning, particularly fire. The Act did not specify those persons who would conduct inspections contemplated by the Code. Pursuant to the Act, the Secretary of State promulgated rules and regulations relating to, inter alia, the frequency and adequacy of inspections. For instance, one such regulation, 19 N.Y.C.R.R. § 429.2(b), makes an inspection of electrical wiring a condition precedent to the issuance of a certificate of occupancy. Section 429.2(b) provides that the local legislative body of a city, town, or village may by resolution provide that such inspections be performed by the following: "a designated officer or employee of the city, town or village"; "a designated officer or employee of another city, town, or village who is qualified to conduct such inspections"; "a person who is qualified to conduct such inspections and who performs such inspections pursuant to a contract with the city, town or village"; "an employee or agent of the county who is qualified to conduct such inspections"; or "a competent inspector, designated or approved by the city, town or village, whose fee shall be paid by the person ... to which the building permit was issued." Id. § 429.2(b)(2)(I)-(v). The regulations further provide that when a municipality "relies upon the contracted for services of an individual, partnership, business corporation or similar firm" for the performance of such inspections, it must satisfy itself as to the qualifications of that firm. Id. § 444.4(a).

According to the parties, municipalities generally require that all electrical wiring be installed in conformity with the "National Electric Code."

EII is a corporation in the business of providing electrical inspections and certificates of compliance with the "National Electric Code" to electricians and residential and commercial property owners. EII provides these electrical services in New York State.

The Board similarly provides electrical inspections and certificates of compliance in New York State. The Board is a not-for-profit corporation created by an act of the New

York State legislature in 1867; the legislature then reconstituted and continued the Board "as a body, corporate and politic, in perpetuity" on April 1, 1930. The Board membership consists of 96 fire insurance companies authorized to write fire insurance policies within the state. Nearly 50% of the Board's revenues are derived from membership dues and assessments paid by the 96 member companies. Pirnie is president of the Board.

Islandia and Oyster Bay Cove are municipalities located in New York, in Nassau County and Suffolk County, respectively. By resolution adopted August 4, 1988, Islandia appointed the Board as its exclusive agent with the right to issue certificates of compliance for electrical work done within its village. EII alleges that Oyster Bay Cove "has and continues to mandate by law or policy that all consumers/residents ... retain the services of the [Board]" as exclusive agent with the right to issue certificates of compliance for electrical work done within its village. Amended Complaint ¶ 23. Thus, while EII may be free to perform electrical inspections in Islandia, Islandia will only issue certificates of occupancy in reliance on the Board's inspections and certificates of compliance. A similar situation allegedly exists in Oyster Bay Cove.[2]

The Board maintains that it charges a uniform rate for its services throughout the state, regardless of whether its services are for a municipality that recognizes the Board as its exclusive agent or for a municipality which authorizes other entities to conduct inspections. According to the Board, it sets its fees annually and disseminates publicly

---

[2]In its amended answer to the complaint, Oyster Bay Cove denies that it has any such "law or policy" extending an exclusive franchise to the Board. Oyster Bay Cove's Amended Answer ¶ 1. However, in its papers in opposition to EII's motion, Oyster Bay Cove concedes that "a policy or practice developed" in Oyster Bay Cove "to accept only the certification of the Board as to the proper and legal wiring of all facilities within the ... Village." Defendant Oyster Bay Cove's Memorandum of Law in Opposition, at 3.

throughout the state its annual schedule of fees. The Board maintains that its fees average $50 to $56, which it characterizes as "nominal." Affidavit of Alexander Pirnie, ¶ 17 & n. 1.

EII does not dispute that the Board charges a uniform rate and that the fee schedule is disseminated throughout Nassau and Suffolk Counties, although it disagrees with the Board's characterization of those rates as "nominal." As to the rates, EII asserts that while the Board charges $56 for inspecting a basic service, its minimum charge is $50 and, depending on the circumstances, the "charge on average will range up to $200." Affidavit of Richard Jendzo ¶ 5.

EII further maintains that neither the state nor these municipal defendants supervise the services rendered by the Board or regulate the fees the Board charges to homeowners and electricians. Islandia, however, maintains that it does exercise supervision over inspector, although it does not purport to regulate the Board's fees. In this respect, Frank Falco, Islandia's mayor, asserts that the village's building department "maintained strict controls over the inspections and the inspectors," "established policies as to the manner in which the electrical inspections were carried out," "enforced the requirement that all inspectors assigned by the [Board] possess the appropriate qualifications," and "provided guidance to the inspectors as to how to proceed when confronted with a unique problem presented by a particular installation." Affidavit of Frank B. Falco ¶¶ 11, 17. Mayor Falco further asserts that EII first contacted the village in 1995 seeking to provide inspection services in Islandia. At that time, the village considered and denied EII's request, determining that it would not be in the best interests of the village (and its residents) or building owners to have more than one qualified agency performing services because additional inspectors "would result in loss of control ... over the electrical inspection process and the quality of the end result." Id. ¶ 15. According to Mayor Falco, if the village were dissatisfied with the Board, it could replace the Board

with another qualified agent, such as EII. Id. ¶ 16. In addition, the Board asserts that under the applicable law and regulations, the municipal defendants, not the Board, possess the actual enforcement authority and power to issue or refuse to issue certificates of occupancy, and the duties of these municipalities necessarily include review of the Board's inspection reports prior to approval or denial of a certificate.

EII claims that Islandia's exclusive arrangement with the Board and Oyster Bay Cove's alleged exclusive arrangement with the Board violate, inter alia, federal antitrust laws. EII asserts that these municipalities must also recognize EII as a qualified inspector. Defendants have asserted, as affirmative defenses, that state action immunity shields them from liability under federal antitrust laws. EII moves to strike those defenses, and Islandia and the Board cross-move for summary judgment dismissing the federal antitrust claims based on state action immunity and dismissing the Donnelly Act claim and other claims. Oyster Bay Cove opposes EII's motion to strike its state action immunity defense and argues that under the circumstances alleged the defense is sufficient as a matter of law.

II. DISCUSSION

On a motion under Rule 12(f), the court may strike from a pleading any "insufficient" defense. Fed.R.Civ.P. 12(f). A motion to strike an affirmative defense is decided on the basis of the pleadings alone. *National Union Fire Ins. Co. v. Alexander*, 728 F.Supp. 192, 203 (S.D.N.Y.1989). Affirmative defenses are subject to the general rules of pleading; consequently, a party "shall state in short and plain terms the party's defenses." Fed.R.Civ.P. 8(b); *D.S. Am. (East), Inc. v. Chromagrafx Imaging Sys., Inc.*, 873 F.Supp. 786, 797 (E.D.N.Y.1995). "An affirmative defense is legally 'insufficient' if, as a matter of law, it cannot succeed under any circumstances." *D.S. Am. (East), Inc.*, 873 F.Supp. at 798.

A party seeking summary judgment must demonstrate that "there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The nonmoving party may defeat the summary judgment motion by producing sufficient evidence to establish a genuine issue of material fact for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In ruling on a motion for summary judgment, the court is required to resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party. See *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 57 (2d Cir.1987). However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Guided by these principles, this Court addresses the sufficiency of the state action immunity defenses, assuming for purposes of discussion the sufficiency of the federal antitrust claims.

A. The Municipal Defendants

Each of the municipal defendants, Oyster Bay Cove and Islandia, argues, inter alia, that the act or alleged act of appointing the Board as exclusive agent with the right to issue certificates of compliance for electrical work done within its village is immune from federal antitrust laws under the "state action immunity" doctrine, which originated in *Parker v. Brown*, 317 U.S. 341, 351-52, 63 S.Ct. 307, 87 L.Ed. 315 (1943). When a state acts in its sovereign capacity, its actions are immune from federal antitrust laws. Id. As state subdivisions, however, municipalities do not enjoy the same deference due a state as sovereign. Rather, a municipality will be immune from federal antitrust laws only if it acts "as an instrumentality of the state, through which the state has clearly and affirmatively chosen to

implement its policies." *Cine 42nd St. Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1042 (2d Cir.1986) (citing *Community Comms. Co. v. City of Boulder*, 455 U.S. 40, 52-54, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982); *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 411-13, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978)). Thus, when a municipality asserts state action immunity, it must identify a "clearly expressed state policy" that authorizes its anticompetitive actions. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985). "The legislation must contain an affirmative showing of intent, though it need do no more than authorize the challenged conduct." *Cine*, 790 F.2d at 1042. As the Second Circuit has recognized, "the 'clear articulation' label is not quite the hurdle that its language suggests, because it has always been synonymous with the foreseeability test." *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 69 (2d Cir.1998). In other words, if the "resulting anticompetitive activities are a foreseeable consequence of the state delegation, the 'clear articulation' standard has been met." Cine, 790 F.2d at 1042. "To meet this requirement the party claiming the state action defense must show that the 'legislature contemplated the action complained of.' " Id. (quoting *Hallie*, 471 U.S. at 44, 105 S.Ct. 1713, in turn quoting *Lafayette*, 435 U.S. at 415, 98 S.Ct. 1123). The Second Circuit in Cine summarized "the rule defining the scope of the delegation" as follows:

> [W]e conclude that the enabling legislation need not explicitly authorize the exact actions undertaken. It is only necessary that the permitted actions produce anticompetitive consequences that foreseeably flow from the grant of state authority. That is, the enabling statute must affirmatively designate a particular area to be regulated, provide the methods of regulation, and create grounds for a reasoned belief that some anticompetitive activity could be envisioned.

Id. at 1043-44.

A review of the Act supports the municipal defendants' argument that the appointment of an exclusive agent is a "foreseeable" consequence of the state delegation of authority to administer and enforce a uniform code. In this respect, the Act declares that it is "the public policy of the state of New York" to, inter alia, "[e]ncourage local governments to exercise their full powers to administer and enforce the uniform code." N.Y. Exec. Law § 371(2)(d) (McKinney 1993) (emphasis added). The Act mandates the uniform and active enforcement, by municipalities, of the contemplated uniform code. The Act designates a discrete area to be regulated, i.e., fire prevention and building construction, an area integral to public health and safety. The Act contemplates the inspection of electrical work to be performed within the limited geographic area of each municipality, and provides a method of regulation, namely, by municipalities exercising their "full powers" to administer and enforce a governing uniform code. Electrical inspections are an integral aspect of municipal building inspections, the regulation of which clearly falls within a municipality's police power. Given this broad delegation of authority over a matter integral to public health and safety, it is foreseeable that a municipality would, though it need not, displace competition in administering and enforcing its own electrical inspection program within its limited geographic area by appointing an exclusive agent. Indeed, the regulations promulgated pursuant to the Act recognize that a municipality may conduct such inspections through its own employees or through a designated agent. Thus, contrary to EII's arguments, it is foreseeable that a municipality would, though it need not, designate an exclusive agent, with or without competitive bidding.

EII argues that because the Board is a private party the municipal defendants are not entitled to state action immunity unless they show "active state supervision." Memorandum of Law in Support of Plaintiff's Motion to

Dismiss Certain Affirmative Defenses of All Defendants, at 4-5. To the extent EII suggests that the municipal defendants must show that the state actively supervised their anticompetitive conduct, there is no such requirement. As the Second Circuit held in Cine: "When the actor is a municipality, the active state supervision requirement is abandoned because a municipality has no incentive to act in other than the public interest." *Cine*, 790 F.2d at 1047. To the extent EII argues that the municipal defendants are not entitled to state action immunity unless they can plead and prove that they maintained "active governmental supervision of the prices or the services rendered by [the Board]," Memorandum of Law in Reply on the Motion and in Opposition to the Defendants' Cross-Motion for Summary Judgment ("Plaintiff's Reply Mem."), at 6, that argument is unavailing under the circumstances alleged by EII. The effective municipal decisions that EII alleges caused injury to EII are the municipal defendants' appointments of the Board as exclusive agent, not the alleged unsupervised Board conduct or alleged unsupervised Board fee-setting. The municipal defendants' decisions to appoint the Board as exclusive agent are immune from attack by EII under the federal antitrust laws by the state action immunity doctrine.

Accordingly, Oyster Bay Cove and Islandia are entitled to state action immunity from EII's federal antitrust claims.

B. The Private Party Defendants

As for the Board's assertion of state action immunity, EIIinitially argues that the Board is barred by collateral estoppel from asserting that defense to EII's federal antitrust claims based on the decision in *Atlantic- Inland, Inc. v. Town of Union*, 126 Misc.2d 509, 483 N.Y.S.2d 612 (Sup.Ct., Broome County 1984). This Court disagrees. In Atlantic-Inland, the court struck down a Town of Union ordinance appointing the Board as exclusive agent to conduct electrical inspections and issue certificates of compliance as violating the state constitution and the Donnelly Act. *Id.*,

483 N.Y.S.2d at 618-19. Although the Board was an intervenor in that action, that action did not involve the same factual or legal issues raised here. Indeed, the court did not address the issue of state action immunity to a federal antitrust claim, and the municipal defendants here were not parties to that action nor were their appointments of the Board as exclusive agent at issue there. Accordingly, collateral estoppel is not a bar to the Board's assertion of state action immunity based on the alleged appointments by Oyster Bay Cove and Islandia.

EII further argues that the Board is not entitled to state action immunity because the Board cannot show "active governmental supervision of the prices or the services rendered by [the Board]." Plaintiff's Reply Mem. at 6. However, a showing of active "governmental" supervision is not required as to the challenged municipal decisions. The effective decision that EII claims caused it injury are the municipal defendants' decisions appointing the Board as exclusive agent. Because the municipal defendants' decisions appointing the Board as exclusive agent are immune from antitrust liability, the Board is similarly immune from antitrust liability as the party receiving those appointments. *See Cine,* 790 F.2d at 1048; *Zimomra v. Alamo Rent-A-Car, Inc.,* 111 F.3d 1495, 1500 (10th Cir.1997); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.,* 810 F.2d 869, 878 (9th Cir.1987); *Bloom v. Hennepin County,* 783 F.Supp. 418, 426-27 (D.Minn.1992); *City Comms., Inc. v. City of Detroit,* 660 F.Supp. 932, 933-35 (E.D.Mich.1987). To allow such a tangential attack on the decision to appoint the Board would effectively block a municipal defendant's efforts to comply with the articulated state policy. *See Cine,* 790 F.2d at 1048.

Accordingly, the Board is entitled to state action

immunity from EII's federal antitrust claims.[3]

III. CONCLUSION

Because defendants are entitled to state action immunity, EII's motion to strike is denied and the Board's and Islandia's motions for summary judgment on the federal antitrust claims are granted. However, before addressing any of EII's supplemental state claims, the parties are directed to address the viability of the remaining federal claims (i.e., due process and equal protection claims). The Court will schedule a conference to address any further briefing.

SO ORDERED.

---

[3]Pirnie and the Board also argue that they are entitled to immunity from EII's federal antitrust claims under the "Noerr-Pennington doctrine" established by the Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). Based on this Court's determination that the Board is protected by state action immunity, it need not address the applicability of the Noerr-Pennington doctrine.

United States Court of Appeals, Second Circuit

ELECTRICAL INSPECTORS, INC.,

Plaintiff-Counter-Defendant-Appellant,

- v. -

VILLAGE OF EAST HILLS, Village of Roslyn and Village of Oyster Bay Cove,

Defendants-Counter-Claimants,

Village of Islandia, Alexander Pirnie and New York Board of Fire Underwriters,

Defendants-Counter-Claimants-Appellees,

Village of Island Park, Village of Brookville, Village of North Hills, Village

of Flower Hill, Village of Great Neck, Village of Great Neck Estates, Village

of Kings Point, Village of Port Washington North, Village of Sea Cliff, Village

of Saddle Rock and Village of Baiting Hollow, Defendants.

Docket No. 01-9483

Argued: June 17, 2002

Decided: December 13, 2002

Before: CALABRESI, SACK, and B.D. PARKER, Circuit Judges.

SACK, Circuit Judge:

This appeal requires us to determine whether the state-action immunity doctrine shields a municipality and a private corporation from alleged federal antitrust-law

violations resulting from the municipality's conferral upon the corporation of exclusivity in the market for government-required electrical inspection services within the municipality.

The defendant Village of Islandia (the "Village") is a municipality located on New York's Long Island. In 1988, the Village adopted a policy of requiring building owners to obtain certificates of occupancy from the Village, and conditioning the issuance of such certificates on the positive results of an electrical wiring inspection conducted by the not-for-profit defendant New York Board of Fire Underwriters (the "Board"). Any property owner who wishes to use or occupy a building is required to submit to and pay the Board for the Board's inspection. The plaintiff, a for-profit corporation that also provides electrical inspection services in the State of New York, brought suit against both the Village and the Board in the United States District Court for the Eastern District of New York alleging that this arrangement resulted in violations of the Sherman Act and other federal and state laws. The district court (Leonard D. Wexler, Judge) concluded that the Village's policy was authorized by an act of the New York State Legislature, and that the actions of the Village and the Board were therefore exempt from the federal antitrust laws under the state- action immunity doctrine. *Elec. Inspectors, Inc. v. N.Y. Bd. of Fire Underwriters*, 145 F. Supp. 2d 271, 279 (E.D.N.Y. 2001) ("EII").

We agree with the district court that for purposes of the state-action immunity doctrine, the state authorized the Village to pass the ordinance that gave the Board exclusivity with respect to the performance of wiring inspections in Islandia. We disagree, however, with the district court's holding that this finding is sufficient in itself to support a dismissal of the plaintiff's federal antitrust-law claims. We conclude that such immunity for the Board against the plaintiff's claim for damages, and possibly for the Village against the plaintiff's claim for equitable relief, requires a

finding that government officials actively supervised the Board. We therefore vacate the judgment of the district court and remand the case for further proceedings consistent with this opinion.

BACKGROUND

In 1981, the New York State Legislature enacted the Uniform Fire Prevention and Building Code Act (the "Act"), N.Y. Exec. Law § 370 *et seq*. The Act required the creation of a state-wide uniform fire code for commercial and residential buildings, *id.* § 377, and it directed New York's various local governments to "dminister and enforce the uniform . . . code," *id.* § 381(2). To facilitate local governments' carrying out of their enforcement responsibilities, the Act directed the New York Secretary of State to "promulgate rules and regulations prescribing minimum standards for administration and enforcement of the uniform . . . code," *id.* § 381(1), and gave the Secretary powers to ensure that local governments enforced the code in compliance with the Secretary's regulations, *id.* § 381(4). The Act required the regulations issued by the Secretary to address, *inter alia*, the frequency of building inspections and the number and quality of inspectors. *Id.*§ 381(1).

Pursuant to the Act, the Secretary issued regulations providing that any property owner who wishes to use or occupy a commercial or residential building must obtain a certificate of occupancy from a local government body. N.Y. Comp. Codes R. & Regs. tit. 19, § 429(c)(1) (repealed 1996). Local governments, in turn, were forbidden from issuing a certificate of occupancy for any building unless a designated officer or agent inspected the building's electrical wiring and certified that it complied with the uniform electrical code. *Id.* § 429(b)(1) (repealed 1996). Finally, the Secretary's regulations (later withdrawn) authorized local governments to pass resolutions designating those who would conduct such inspections. The specified options were (1) "a designated officer or employee of the city, town, or village"; (2) "an employee or agent of another city, town, or

village who is qualified to conduct such inspections"; (3) "a person who is qualified to conduct such inspections . . . pursuant to a contract with the city, town, or village"; (4) "an employee or agent of the county who is qualified to conduct such inspection"; and (5) "a competent inspector, designated or approved by the city, town, or village." *Id.* § 429.2(b)(2)(i)-(iv) (repealed 1996).

Pursuant to those regulations and prior to their repeal, on August 4, 1988, the trustees of the Village passed an ordinance resolving that the Village "accepts [the Board] as its only electrical inspecting agency." Thereafter, the Village required all applicants for certificates of occupancy to present proof that the Board had inspected the electrical wiring in their buildings and certified that it complied with the National Electric Code.[1]

The Board is a not-for-profit corporation that received its charter from the New York State Legislature in 1867.[2] Its members are ninety- six insurance companies authorized to write fire insurance policies in New York. According to an affidavit submitted by defendant Alexander Pirnie, the Board's former president,[3] the Board engages in two principal activities: It maintains the New York City Fire Patrol, a group of patrolmen who assist New York City's firefighters, and it inspects electrical equipment and issues

---

[1]The National Electric Code is "a model code promulgated by the National Fire Protection Association," *Edison Elec. Inst. v. Occupational Safety & Health Admin.*, 849 F.2d 611, 614 (D.C. Cir. 1988), which is "an international nonprofit membership organization," *see* NFPA Overview, at http://www.nfpa.org/Home/ AboutNFPA/NFPAOverview/ NFPAOverview.asp (last visited December 12, 2002).

[2]On April 1, 1930, the New York State Legislature reconstituted and continued the Board "as a body, corporate and politic, in perpetuity."

[3] The distinction between the Board and Pirnie is not relevant for purposes of this appeal, and our legal conclusions regarding the Board apply equally to Pirnie.

certificates of compliance with the National Electric Code. Pirnie Aff. ¶¶ 4, 11. Approximately 250 New York municipalities have adopted policies that, like the Village's, effectively require building owners to obtain certificates of compliance from the Board. *Id.* ¶ 12. The Board charges a fee for inspections to be paid by the property owner.

The plaintiff, Electrical Inspectors, Inc., is a for-profit corporation that, like the Board, inspects electrical wiring in commercial and residential properties in New York State and issues certificates of compliance with the National Electric Code. On March 1, 1999, the plaintiff brought this action in the district court against fifteen New York municipalities including the Village; on September 9, 1999, it amended its complaint to name the Board as a defendant. The plaintiff alleged various violations of the Sherman Act, 15 U.S.C. §§ 1 & 2, the Donnelly Act, N.Y. Gen. Bus. Law § 340(1), its federal due process rights, and its federal and state equal protection rights. According to the amended complaint, the municipalities' policies of conferring monopoly power within their respective boundaries on the Board were unauthorized by state law and had the illegal effect of excluding the plaintiff from local markets for electrical inspection services. Amend. Compl. ¶ 139. The plaintiff also alleged that the Board actively sought and maintained such grants, and abused its exclusive positions by providing low-quality service and by seeking to expand its overall market share by threatening to retaliate in those locations where it has exclusivity against customers who use the plaintiff's services where competition is allowed. *Id.* ¶¶ 52, 69, 72, 112, 118.[4] The plaintiff sought monetary damages against the Board, and injunctive and declaratory relief against the municipalities, for their asserted violation of the federal antitrust laws.

---

[4] The plaintiff also challenged the legitimacy of the Board's status as a non-profit entity, alleging that the Board's exemption from income taxes enabled it to earn "excess profits" that accrued to the benefit of its for-profit members. Amend. Compl. ¶¶ 45, 113.

The defendants assert in their answer, *inter alia*, that they are immune from the plaintiff's federal antitrust-law claims under the state-action doctrine. The plaintiff moved to strike this defense as insufficient pursuant to Federal Rule of Civil Procedure 12(f), and the defendants cross-moved for summary judgment on the federal antitrust law claims.

On March 30, 2001, the district court issued a Memorandum and Order denying the plaintiff's motion to strike and granting the defendants' motion for summary judgment. EII, 145 F. Supp. 2d at 279. The court held that the municipalities were immune from federal antitrust liability on the grounds that the Act gave them "broad . . . authority over a matter integral to public health and safety," and that appointing exclusive agents to conduct required electrical inspections was "a 'foreseeable' consequence of the state delegation of authority." *Id.* at 277-78. The district court then concluded that the municipalities' immunity under the state-action doctrine extended to the Board. "Because the municipal defendants' decisions appointing the Board as exclusive agent are immune from antitrust liability, the Board is similarly immune from antitrust liability as the party receiving those appointments." *Id.* at 279 (citing *Cine 42nd St. Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1048 (2d Cir. 1986)).

On September 21, 2001, the plaintiff voluntarily dismissed its federal constitutional claims against the municipal defendants. The district court subsequently issued a judgment dismissing with prejudice the plaintiff's federal antitrust-law claims, and dismissing without prejudice the plaintiff's state-law claims for want of supplemental jurisdiction. The plaintiff now appeals, challenging only the district court's dismissal of its federal antitrust-law claims against the Board and the Village.

DISCUSSION

I. Standard of Review

We review a district court's grant of summary judgment de novo, construing the evidence in the light most favorable to the non-moving party. *Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir. 1999), cert. denied, 529 U.S. 1098 (2000). A district court must grant a motion for summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," Fed. R. Civ. P. 56(c), i.e., "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A fact is "material" for these purposes if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

II. State-Action Immunity for the Village

The Village regulates the usage of local real estate by requiring all owners of commercial and residential buildings who wish to use or occupy their property to obtain from the Village a certificate of occupancy. In order to do so, for reasons of fire safety, a property owner must, under the Village ordinance, first submit the property to an electrical wiring inspection by the Board, pay the Board's fee, and receive from the Board certification that the wiring complies with the National Electric Code. The plaintiff alleged in its amended complaint that the Village's conferral of such exclusivity on the Board violates, *inter alia*, the Sherman

Act, and sought injunctive and declaratory relief.[5] The Village asserts the affirmative defense that its action was pursuant to state policy and thus was exempt from the federal antitrust laws under the state-action immunity doctrine. The district court agreed with the Village. The plaintiff challenges this holding on appeal.

Because the district court granted judgment to the Village on its affirmative defense, neither the standing of the plaintiff under the antitrust laws to make all of the underlying claims it asserts nor the merits of the claims are at issue in this appeal. Our only task with regard to the plaintiff's claims against the Village is to evaluate the district court's conclusion that the Village is immune.

A. Immunity for Municipal Economic Regulation

In *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991) ("*Omni Outdoor*"), the Supreme Court addressed state-action immunity for municipal regulatory schemes. There, the City of Columbia, South Carolina, asserted immunity from a claim under the Sherman Act that its restrictions on the size, location, and spacing of billboards hindered the ability of newcomers to compete in the billboard construction market. *Id.* at 367-69. The Court began its analysis by noting that under the state-action immunity doctrine established by its decision in *Parker v. Brown*, 317 U.S. 341 (1943), "the Sherman Act [does] not apply to anticompetitive restraints imposed by the States 'as an act of government.'" *Omni Outdoor*, 499 U.S. at 370

---

[5]The plaintiff does not allege that the Village has created a monopoly in the sense that it forbade property owners from hiring the plaintiff. The plaintiff's allegation is, rather, that the Village's requirement that every owner submit a Board-issued certificate of compliance in order to receive a certificate of occupancy effectively eliminated demand for the plaintiff's services. The implicit assumption, which we have no reason to doubt, is that property owners have little need for additional inspection services once they have obtained a certificate of occupancy.

(quoting *Parker*, 317 U.S. at 352). The Court explained that the doctrine is grounded in "principles of federalism and state sovereignty." *Omni Outdoor*, 499 U.S. at 370. Local governments are not sovereign, and so their actions are not automatically immune under *Parker*. *Omni Outdoor*, 499 U.S. at 370. Nonetheless, because states sometimes effect regulatory regimes through local government bodies, municipalities may avail themselves of *Parker* immunity to the extent their actions are "an authorized implementation of state policy." *Id.*

The Court held that municipalities that wish to avail themselves of *Parker* immunity must show that their regulations were authorized by the state. The requisite showing of authority has two components: First, the municipality must have "authority to regulate"; second, it must have "authority to suppress competition." *Id.* at 372; accord *Hertz Corp. v. City of New York*, 1 F.3d 121, 128 (2d Cir. 1993) (holding that under *Parker* a municipality must establish that "the resulting anticompetitive activities are a foreseeable consequence of [a] state delegation" (quoting *Cine 42nd St. Theater Corp. v. Nederlander Org.*, Inc., 790 F.2d 1032, 1043 (2d Cir. 1986) ("*Cine*"))), cert. denied, 510 U.S. 1111 (1994).

To determine whether the City of Columbia had "authority to regulate," the Supreme Court looked to the terms of the relevant South Carolina statutes. *Omni Outdoor*, 499 U.S. at 371. At the same time, the Court held that federal courts, when determining state-action immunity for municipalities, must "adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law." Id. at 372. This broader concept of authority is necessary, the Court explained, because a doctrine of state-action immunity that "transform[ed] state administrative review into a federal antitrust job" would undermine "the very interests of federalism [the *Parker* doctrine] is designed to protect." Id. at 372 (citation omitted). For this reason, the Court held,

the inquiry into a municipality's authority to regulate should not be exacting. Id. at 371. The Court went on to decide that language in the South Carolina statute authorizing local governments to regulate the height and size of "structures" constituted sufficient authority for the City of Columbia's billboard regulations. Id. at 372-73 & n.4. Although the statute also provided that municipal ordinances were valid only if they served "the purpose of promoting health, safety, morals or the general welfare of the community," the Court declined to inquire whether the city's ordinance fulfilled this requirement. Id. at 370 n.3, 371-73 (citation and internal quotation marks omitted). The Court's decision not to inquire as to whether Columbia's ordinance was actually authorized by state statute suggests that as long as the local enactment is within a broad view of the authority granted by the state, whether it is actually violative of that statute is a question for state authorities, not one of federal antitrust law.

With regard to the second component of the inquiry, i.e., whether the City of Columbia had "authority to suppress competition," the Supreme Court began by "reject[ing] the contention that this requirement can be met only if the delegating statute explicitly permits the displacement of competition." *Id.* at 372. Instead, the Court held, the requirement is met "if suppression of competition is the 'foreseeable result' of what the statute authorizes." *Id.* quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985)). The Court then asked whether a logical relationship existed between the purpose of the state statute and its alleged anticompetitive effect, and observed that "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." *Omni Outdoor*, 499 U.S. at 373. On this basis, the Court concluded that suppression of competition was a foreseeable result of the South Carolina statute, and thus that the City of Columbia

had met the requirements for immunity for its regulatory scheme. Id. at 374.

The Supreme Court's analysis in *Omni Outdoor* mirrored the approach that this Court had followed in *Cine*. There we examined the actions of the New York "Urban Development Corporation," or "UDC," a public entity designed by the New York State Legislature "to make the State an active participant in the financing and construction of urban renewal projects." *Cine*, 790 F.2d at 1036. The UDC purchased theaters in the Times Square area of New York City and then awarded leases on them to private developers, prompting parties whose applications for leases had been rejected to bring suit under the Sherman Act against both the UDC and the winning bidders. *Id.* at 1037-38. The defendants claimed state-action immunity. *Id.* at 1038.

We began our analysis by holding that because the UDC was a "political subdivision of the state," it was like a municipality for purposes of the *Parker* doctrine. *Cine*, 790 F.2d at 1047. We then concluded that in order to qualify for state-action immunity, the UDC was required to "show [1] that it acted pursuant to a clearly expressed state policy and [2] that the resulting antitrust consequences were reasonably contemplated by the state." *Id.* at 1047-48.

With regard to the first component, we found authority for the UDC's actions in language in the UDC's enabling statute that specifically empowered it to purchase, and issue leases on, real property. *Id.* at 1045. Under the second component, we concluded that harm to some businesses around Times Square was a foreseeable consequence of the creation of an entity whose purpose was to improve a blighted urban area:

> It is fair to conclude that the legislature contemplated that when it granted power to the UDC to determine what buildings and services would be

> provided in a particular redeveloped land use project, it knew those choices would affect businesses and residences in that entire area. Such a conclusion is based on common sense. As a result of cultural improvements, rents and property values would increase even though some competitors would be adversely impacted, and some would disappear.

Id. at 1047. On this basis, we held that the UDC had shown sufficient state authority for its actions, and thus was immune under the *Parker* state-action immunity doctrine.

B. The New York Act and the Village Ordinance

The Village argues that its actions effectively excluding the plaintiff from the market for electrical inspections within its boundaries were authorized by the Act and related regulations issued by the New York Secretary of State. To evaluate the Village's defense, we follow the two-step inquiry set forth and applied in *Omni Outdoor* and *Cine*.

1. Step One: Authority to Regulate. The Village cites two provisions of the Act for its authority to regulate: § 381, which provides that "every local government shall administer and enforce the uniform fire prevention and building code"; and § 371, which states that "it shall be the public policy of the state of New York" to "[e]ncourage local governments to exercise their full powers to administer and enforce the uniform code." N.Y. Exec. Law §§ 381(2), 371(2)(d). The Village also cites for support the regulations issued pursuant to the Act by New York's Secretary of State.

The plaintiff disagrees that the Act confers any new powers on New York municipalities that they do not already have, and argues that the statutory language cited by the Village merely directs local governments to apply to a particular purpose powers arising from other statutory

sources. If the plaintiff's interpretation of the Act is correct, then the state-action immunity defense is unavailable because the Village has not identified any other specific statutory source of regulatory power, and the principle is well established that a municipality may not fall back on its general police or "home-rule" powers to immunize anticompetitive regulations. *See Cmty. Communications Co. v. City of Boulder*, 455 U.S. 40, 56 (1982); Hertz, 1 F.3d at 128.

If the Village had only the language of the Act to rely upon, its authority for purposes of the *Parker* doctrine might be subject to doubt. The cited provisions can be read as no more than a direction to New York State municipalities as to how to act, in contrast with statutory language relied on by municipalities in cases in which they have been held to be immune where a similar direction was coupled with an explicit conferral of regulatory power. *See Omni Outdoor*, 499 U.S. at 370-71 n.3 (South Carolina statute providing that "the legislative bod[ies] of cities and incorporated towns may by ordinance regulate . . . buildings and other structures"); *Cine*, 790 F.2d at 1045 (New York statute empowering the UDC "to acquire . . . real, personal or mixed property[,] and to sell . . . [or] lease . . . the same").

We conclude, however, that the regulations issued by the Secretary soon after the passage of the state statute make clear that even if the Village's ordinance was not actually authorized by the state statute itself, it was within the broad grant of state authority. The Secretary's regulations authorized municipalities to condition occupation and use of a building on the result of an electrical inspection, and "by resolution provide that such inspection shall be performed by [an] inspector, designated or approved by the . . . town." N.Y. Comp. Codes R. & Regs. tit. 19, § 429(b) (repealed 1996). The regulations appeared to interpret the statute to authorize the Village, or at least to authorize the Secretary to authorize the Village, to do precisely that which the

Village has done.[6]

We think that the Act, combined with the Secretary's apparent interpretation of it, sufficiently demonstrates the Village's broad "authority to regulate" for purposes of state-action immunity. The Village has cited statutory language that, although perhaps ambiguous on the question, can be interpreted as delegating a power to regulate, and it has cited regulations issued by the agency charged with enforcing the statute that confer a power to regulate in plain language. Even though those regulations were subsequently withdrawn, they establish the Village's contention that its action was within the broad authority to regulate granted by the state statute itself. Under the broad concept of authority that principles of federalism compel us to apply, we conclude that these sources are sufficient for purposes of *Parker* state-action immunity analysis.

2. Step Two: Authority to Suppress Competition. We also conclude that the Act and the Secretary's regulations establish the second component of authority that municipalities must show under *Parker*. The specific anticompetitive harm that the plaintiff alleges results from the Village's actions is the plaintiff's complete exclusion from the market for required electrical inspection services. We think that such exclusion is a foreseeable result of a statute that requires municipalities to enforce a uniform fire code and administrative regulations that condition the issuance of certificates of occupancy upon inspections by town-designated agents. "[C]ommon sense," *Cine*, 790 F.2d at 1047, indicates that a municipality in the course of enforcing

---

[6]While, under the principles announced *Omni Outdoor*, it is not for us as a federal court of appeals to decide on this appeal whether the Village's acts are ultra vires, neither do we decide that had a state court determined that the acts were ultra vires, we would nonetheless conclude that the municipality or the private actor was entitled to state- action immunity.

a fire code is likely, for quality control purposes, to limit the set of persons who may issue certificates of compliance, "even though some competitors would be adversely impacted," id. And common experience indicates that municipalities often use their own employees to enforce a variety of public codes, such as food preparation or building codes, thereby effectively conferring upon themselves exclusivity in the market for required inspection services at a cost to private entities that would perform the same services. The Secretary specifically authorized such town-operated monopolies. N.Y. Comp. R. & Regs. tit. 19, § 429.2(b)(I) (repealed 1996). Such a regime also appears to be contemplated by the section of the Act that provides that "[l]ocal governments or counties may charge fees to defray the costs of administration and enforcement," N.Y. Exec. Law § 381(2). Thus, complete exclusion of a potential competitor in the market was foreseeable.

The plaintiff argues that even if a town-operated monopoly was foreseeable, the designation of a private party as the party enjoying exclusivity was not. We think, however, that the plaintiff's argument misunderstands the nature of the foreseeability inquiry. Our task in assessing the second component of authority identified in *Omni Outdoor* is to determine whether the state intended or at least could have contemplated that its policy would result in "suppression of competition." 499 U.S. at 373; accord *Cine*, 790 F.2d at 1047. Whom the municipality selected as the party exercising exclusivity is at best tangential to the inquiry into the foreseeability of suppression of competition. By definition, the creation of a monopoly suppresses -- indeed eliminates -- all competition in that locality, and in this sense the degree of suppression is the same whether the party exercising the power arising out of exclusivity is public or private. The foreseeability inquiry requires us to go no further. *See Cine*, 790 F.2d at 1045-46 (identifying the relevant question as whether the UDC's entry into leases with private parties was foreseeable, and not inquiring into

the foreseeability of its selection of any party in particular). We therefore conclude that the suppression of competition resulting from the Village's actions was a foreseeable consequence of what the state authorized.

C. The Supervision Issue with Regard to the Village

Before we can decide whether the Village is immune from the plaintiff's claims, however, we must confront yet one more issue. The plaintiff argues that for a municipality to be immune under the *Parker* state-action immunity doctrine, it must show, in addition to state authority for its regulatory scheme, that government officials actively supervise those private parties whom the municipality regulates.

Whether a municipality must make such a showing appears to be an open question. The Supreme Court held in *Town of Hallie* that a municipality need not show that it is supervised by state officials for it to qualify for state-action immunity. 471 U.S. at 46. But the Supreme Court also indicated that "[w]here state or municipal regulation by a private party is involved, . . . active state supervision must be shown, even where a clearly articulated state policy exists." Id. at 46 n.10. This raises the question of whether a failure to show active supervision of a private party can defeat both the municipality's claim of immunity and the private party's, or only the private party's. We are not aware of any decision that squarely addresses this issue.

The law regarding the active supervision requirement has developed almost entirely in the context of claims against private parties. We will therefore return to the question of whether the Village's immunity might depend upon a showing that the Board is actively supervised by the Village after we review the plaintiff's claims against the Board.

III. The Board's State-Action Immunity Defense

The plaintiff alleged in its amended complaint that the Board violated the Sherman Act by willfully seeking and maintaining monopolies in various New York municipalities, and by abusing its monopoly power by providing low- quality service and by attempting to expand its overall market share by threatening retaliatory action against those persons who use the plaintiff's service where competition is allowed. The district court, citing our decision in *Cine*, held that the municipalities' immunity under the *Parker* doctrine necessarily also protected the Board: "Because the municipal defendants' decisions appointing the Board as exclusive agent are immune from antitrust liability, the Board is similarly immune from antitrust liability as the party receiving those appointments." EII, 145 F. Supp. 2d at 279. The plaintiff argues on appeal that the district court misapplied the law of state-action immunity for private parties.[7]. The Board argues that the district court's holding

---

[7]The plaintiff also argues that the decision of New York Supreme Court, Broome County, in *Atlantic-Inland*, 126 Misc. 2d at 516, 483 N.Y.S. 2d at 618, collaterally estops the Board from asserting a state- action immunity defense in this case. The fact pattern of *Atlantic-Inland* was similar to that of the instant case: An electrical inspection firm, alleging violations of its constitutional rights and New York antitrust law (i.e., the Donnelly Act), sued a municipality that had designated the Board its exclusive provider of required electrical inspections. The Board intervened on the side of the municipality. The court entered judgment against the defendants, holding that "the [municipality's] ordinance is anticompetitive and an unwarranted monopoly in violation of the Donnelly Act." *Id.* at 517, 483 N.Y.S.2d at 618. Although the court's opinion in *Atlantic-Inland* does not mention the state-action immunity defense, the plaintiff argues that the Board could have raised the defense in that case, and so its defeat precludes it from raising the defense now. The plaintiff's collateral estoppel argument fails as a matter of law. Unlike the federal antitrust laws, the Donnelly Act contemplates no state- action exception. *Elec. Inspectors, Inc. v. Village of Lynbrook*, 293 A.D.2d 537, 538, 740 N.Y.S.2d 412, 413 (2d Dep't 2002). Thus, even if the Board raised state-action immunity in *Atlantic-Inland*, rejection of that defense was not necessary

was correct, and in the alternative that under the *Noerr-Pennington* doctrine, certain allegations by the plaintiff fail to allege an antitrust injury.[8]

A. The State-Action Defense for Private Actors

There are circumstances under which private parties may avail themselves of the *Parker* state-action immunity doctrine. The Supreme Court has explained the purpose of extending state-action immunity to private parties thus:

> The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce. If *Parker* immunity were limited to the actions of public officials, this assumed congressional purpose would be frustrated, for a State would be unable to implement programs that restrain competition among private parties. A plaintiff could frustrate any such program merely by filing suit against the regulated private parties, rather than the state officials who implement the plan. We decline to reduce *Parker*'s holding to a formalism that would stand for little more than the proposition that [the plaintiff] sued the wrong parties.

---

to the disposition, and so that case does not preclude the Board from raising the defense here. *See Fuchsberg & Fuchsberg v. Galizia*, 300 F.3d 105, 109 (2d Cir. 2002) (collateral estoppel applies only to issues necessarily resolved in previous proceeding).

[8]In a supplemental brief that we requested at oral argument, the Board asserted for the first time a defense under the Local Government Antitrust Act of 1984, 15 U.S.C. § 34 et seq.. Because the Board did not raise the defense in its principal appellate brief, the Board has abandoned the defense and we do not consider it. *See*, e.g., *Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir. 1999).

S. Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 56-57 (1985) (footnote omitted) ("*Motor Carriers*").

In *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980), the Supreme Court established that private parties must satisfy a two-prong test to qualify for state-action immunity. First, the private party must show that the alleged anticompetitive acts were pursuant to a "clearly articulated and affirmatively expressed . . . state policy" to displace competition. *Id.* (citation and internal quotation marks omitted). Second, it must show that its conduct was "actively supervised by the ate itself." *Id.* (citation and internal quotation marks omitted).

More recently, the Supreme Court made clear that the first prong of the *Midcal* test is not as demanding as the Court's statement of it in *Midcal* suggests. It does not, for example, require a private party to show "'a specific, detailed legislative authorization' for its challenged conduct." *Motor Carriers*, 471 U.S. at 64 (quoting *Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 415 (1978)). Rather, "[a]s long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied." *Motor Carriers*, 471 U.S. at 64. For example, in *Motor Carriers* itself, the Court held that a private party accused of horizontal price fixing had satisfied the first prong of *Midcal* by showing that a state legislature had instructed a state agency to prescribe "just and reasonable" prices, and the agency, in turn, had "exercised its discretion by actively encouraging collective ratemaking." *Id.* at 63-64.

Under the second prong of the *Midcal* test -- active state supervision -- a private defendant must show not only that "state officials have . . . [the] power" to supervise, but also that those officials "exercise [that] power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."

Patrick v. Burget, 486 U.S. 94, 101 (1988). This requirement of official involvement seeks to prevent states from transforming the *Parker* doctrine, designed to accommodate the states' sovereign interest in regulating commerce, into an unbounded license for the states to issue Sherman Act exemptions to private parties. *See Motor Carriers*, 471 U.S. at 57 ("Th[e] supervision requirement prevents the State from frustrating the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." (quoting *Midcal*, 445 U.S. at 106)); *Parker*, 317 U.S. at 351 ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."). This second part of the *Midcal* test thus serves as a counterweight to the first because it "ensure[s] that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick*, 486 U.S. at 100-01.[9]

The Supreme Court's most recent decision applying the active supervision prong is *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992). There, the Court held that arrangements whereby states authorized horizontal price fixing among insurance companies, but required the companies to file collective tariffs that state agencies had the option to reject, lacked sufficient state supervision to qualify for immunity. Id. at 639. To fulfill the active supervision prong, the Court

---

[9] Municipalities need not show that the state actively supervises them for them to be immune with regard to their own anticompetitive behavior under the *Parker* doctrine because "there is little or no danger that [a municipality] is involved in a private price-fixing arrangement." *Town of Hallie*, 471 U.S. at 47 (emphasis in the original). "The only real danger is that [the municipality] will seek to further purely parochial public interests at the expense of more overriding state goals." *Id.* By way of contrast, when "a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." *Id.*

held, private parties must prove that state officials "have undertaken the necessary steps to determine the specifics" of the regulatory regime; a mere "negative option" among state agencies to reject prices proposed by private parties is insufficient. Id. at 638-39. "The mere potential for state supervision is not an adequate substitute for a decision by the State." Id. at 638.

The Supreme Court followed a similar approach in *Patrick*, a case that involved an accusation by a physician that a group of his peers had conspired to deprive him of hospital privileges in violation of the Sherman Act. 486 U.S. at 97-98. Although the defendants presented evidence of state policies encouraging physician peer review, the Court rejected their immunity claims because they had failed to show that state actors actively reviewed "private decisions regarding hospital privileges to determine whether such decisions comport[ed] with state regulatory policy and to correct abuses." Id. at 101.

Although the Supreme Court has applied the two-part *Midcal* test in each of its subsequent cases involving an assertion of state-action immunity by a private party, we have twice declined to engage in an independent immunity inquiry for a private party whose alleged anticompetitive conduct was to participate in "concerted" action with a government entity authorized by the state to take such action. Our first decision in this line was *Cine*, a case which, as discussed in Part II.A., above, involved efforts by a state-created entity, the UDC, to improve the Times Square area by purchasing theaters and then leasing them to developers. Although the *Cine* plaintiffs asserted that "collusive and monopolistic" pricing policies would result from the coordinated action between the UDC and the private-party defendants, the only anticompetitive conduct alleged by the plaintiffs to be illegal was the private parties' seeking, and the UDC's awarding, long- term leases on theaters. 790 F.2d at 1037-38; *see also Cine 42nd St. Theater Corp. v. Nederlander Org.*, 609 F. Supp. 113, 119 (S.D.N.Y. 1985),

aff'd, 790 F.2d 1032 (2d Cir. 1986) (setting forth the plaintiffs' contentions). After concluding that the UDC's actions were fully authorized by New York State and therefore immune, we held that such immunity extended automatically to the "private [parties] acting in concert with the UDC." *Cine*, 790 F.2d at 1048. We explained that "[w]hen the UDC accomplishes its goal in a protected manner, and the participation of private third parties was reasonably contemplated by the legislature, allowing successful tangential attacks on the UDC's activities through suits against the third parties would effectively block the efforts of the UDC." Id.

Our second such decision was *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59 (2d Cir. 1998), which involved alleged antitrust-law violations arising from contracts between a state- operated waste-disposal entity and private waste-disposal companies promising to honor each other's exclusive service agreements with various towns. Id. at 63. After concluding that the state agency's actions were authorized under a state statute and thus immune from federal antitrust-law liability, we held, relying on *Cine*, that the private companies were also immune because "[s]ubjecting them to antitrust liability would effectively block [the state entity's] efforts to carry out its mandate through contracts with private parties." *Id.* at 74. As in *Cine*, the only anticompetitive actions allegedly taken by the private-party defendants were those of contracting with the state-created entity. *Id.* at 71.

The Board argues on appeal that the Supreme Court's decision in *Ticor* and ours in *Cine* and *Wheelabrator* stand for the proposition that the active state-supervision test of *Midcal* is applicable only in horizontal price- fixing cases. We disagree. With regard to *Ticor*, the Supreme Court did not limit *Midcal* to any particular form of private anticompetitive conduct, but instead simply cautioned that its holding that the private defendants were not immune "should be read in light of the gravity of the antitrust

offense, the involvement of private actors throughout, and the clear absence of state supervision." 504 U.S. at 639. Four years before *Ticor*, moreover, the Supreme Court, without dissent, applied the active supervision prong in *Patrick*, a case that had nothing to do with price fixing. 486 U.S. at 100.

We think that *Cine* and *Wheelabrator*, rather than departing from the logic of *Midcal*, are consistent with it. Each of the cases in which the Supreme Court or we applied *Midcal* involved governmental authorization of agreements in restraint of trade by private entities or individuals.[10] The danger posed by such schemes is that granting to private actors "a degree of private regulatory power," *Fisher v. City of Berkeley*, 475 U.S. 260, 268 (1986) (citation and internal quotation marks omitted), creates a substantial risk of "frustrating the national policy in favor of competition," *Motor Carriers*, 471 U.S. at 57, by giving them the authority to execute their own anticompetitive schemes. The requirement of active state supervision ensures that anticompetitive acts are driven by the interests of the state, not the private party's own interests. *Town of Hallie*, 471 U.S. at 47.

In *Cine*, the plaintiff did not allege that the private parties were engaging in their own anticompetitive scheme. The sole allegation in *Cine* was that private parties benefitted from a reduction in competition by participating in the government's own regulatory scheme, not that the

---

[10]E.g., *Ticor*, 504 U.S. at 625-29 (state laws authorizing private title insurers to set insurance rates, and enforcing the rates by law unless state exercised negative option to reject rates); *Patrick*, 486 U.S. at 95 (state law authorizing horizontal boycotts by doctors); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 342-43 (1987) (state law allowing liquor wholesellers to establish retail prices); *Motor Carriers*, 471 U.S. at 50-51 (state laws allowing common carriers to jointly propose prices to agency which would enforce them); *Midcal*, 445 U.S. 97, 99-101 (state law preventing retailers from selling wine below prices established by wine producers for geographic areas).

state had delegated any rule-making or regulatory authority to the private parties. 790 F.2d at 1038-39. There was therefore no allegedly anticompetitive act for the state to supervise.

In *Wheelabrator*, the plaintiff alleged only that the state had itself entered into a horizontal agreement with a competitor. 155 F.3d at 62. When the state enters into an anticompetitive agreement for its own financial benefit, there is no risk that the private acts are part of an anticompetitive scheme that is not "the State's own," *Ticor*, 504 U.S. at 635, and therefore no delegation of governmental authority for the state to actively supervise. Wheelabrator's discussion of *Ticor* applied only to horizontal agreements between private parties and the state as competitors.

Although *Wheelabrator* did say that "*Ticor* has no relevance" unless a case involved "price-fixing," 155 F.3d at 74, this statement must be viewed in light of the facts of that case. In the case at bar, the Village granted the Board exclusivity within its borders. The potential in such a scheme for a private actor to pursue its own anticompetitive interests, rather than the government's, is similar to what it would be had the government authorized competitors jointly to set prices, as in *Ticor*. For example, the plaintiff alleges that the Board threatened to retaliate, in those areas in which it has exclusivity, against those who hire the plaintiff in areas where the plaintiff and the Board compete. If there is evidence that the Village actively supervises the Board's conduct, it may be properly characterized as an "anticompetitive scheme [that is] the State's own." *Ticor*, 504 U.S. at 635. If not, it may properly be viewed as a "gauzy cloak of state involvement over what is essentially private anticompetitive activity," *Motor Carriers*, 471 U.S. at 57 (citation and internal quotation marks omitted), advancing the Board's "own interests, rather than the governmental interests of the State," *Patrick*, 486 U.S. at 100.

We are thus of the view that *Cine* and *Wheelabrator* do not shed doubt on our conclusion that state-action immunity is available for the Board only if it can satisfy *Midcal's* two-prong test.

B. The Board's Actions

We now apply the *Midcal* test to each of the Board's actions that the plaintiff alleges violate the Sherman Act. Perhaps mindful of our observation in *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) (Hand, J.), that a company does not violate the antitrust laws when monopoly is "thrust upon it," *id.* at 429, the plaintiff does not claim that the Board violated the Sherman Act merely because the Village passed an ordinance according it exclusivity within the Village. Instead, the plaintiff's claim is that the Board actively sought and abused that monopoly power.

1. The First Part of the *Midcal* Test. We concluded in Part II.B., above, that the Village's conferral of exclusivity upon the Board was "an authorized implementation of state policy." *Omni Outdoor*, 499 U.S. at 370. We think that this holding also satisfies the first prong of the *Midcal* test for the Board to the extent that the Board's alleged anticompetitive actions were "pursuant" to the grant of exclusivity. *Town of Hallie*, 471 U.S. at 40. The plaintiff's amended complaint alleges anticompetitive actions by the Board in municipalities other than the Village, suggesting that the first prong of the *Midcal* test for purposes of these actions would depend on the authority of these other municipalities to confer monopoly powers upon the Board. On appeal, however, the plaintiff has not raised arguments addressing these municipalities' authority as distinct from the Village's, and so we assume that our analysis of the Village's authority applies equally to these other municipalities for the limited

purpose of assessing the Board's satisfaction of the first prong of *Midcal*.

The plaintiff also alleges that the Board attempted to monopolize inspections services by seeking government-issued exclusivity. Amend. Compl. ¶¶ 55, 84. Because these actions were not pursuant to state policy, but rather in pursuit of it, they do not appear to qualify for *Parker* immunity. They may, however, be protected under the *Noerr-Penington* doctrine. *See Omni Outdoor*, 499 U.S. at 379-80 (holding that the Supreme Court's decisions in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *Mine Workers v. Pennington*, 381 U.S. 657 (1965), establish that "[t]he federal antitrust laws . . . do not regulate the conduct of private individuals in seeking anticompetitive action from the government"). We leave any analysis of this issue to the district court in the first instance on remand.

The Board's alleged poor service and retaliatory threats within the Village, if they occurred, unlike the Board's alleged action in lobbying for exclusivity, were pursuant to the exclusivity granted to the Board in the sense that the Board's insulation from competition would have lent these actions much of their capacity to harm. We thus conclude that these alleged actions pass the first part of the *Midcal* test.[11] Further inquiry into whether the Board is immune with respect to them must be conducted under the second part of the *Midcal* test: whether there was adequate active

---

[11]The plaintiff also alleges that the Board has sought to improperly extend use of its monopoly power into localities that have not made it the exclusive provider of inspection services, by threatening customers who use plaintiff's services where they are salable with retaliation in those localities in which the Board has been granted exclusivity. Amend. Compl. ¶¶ 69-72. We leave it to the district court on remand to determine in the first instance whether such actions, if they occurred, were without state-action immunity because they were not reasonably foreseeable anticompetitive effects of the authorized implementation of state policy, or otherwise.

supervision of the Board.

2. The Second Part of the *Midcal* Test. With respect to the active state supervision part of the *Midcal* test as applied to the Board's remaining alleged anticompetitive conduct, the Board argues in the alternative that adequate supervision was present. In support, the Board cites an affidavit in which the Village's mayor asserts that the Village's building department "maintained strict controls over the inspections" by "establishing policies as to the manner in which the electrical inspections were carried out . . . [,] enforc[ing] the requirement that all inspectors . . . possess the appropriate qualifications . . . [and] provid[ing] guidance to the inspectors as to how to proceed." Mayor Frank Falco Aff. ¶ 11. The mayor also asserts in his affidavit that the Village could have replaced the Board at any time by resolution had it become dissatisfied with the Board's services. *Id.* ¶ 16.

As we have noted, the district court did not determine whether the Board was actively supervised, holding instead that this part of the *Midcal* test need not be met. We decline to decide this heavily factual issue in the first instance on the record before us. *See Walker v. Jastremski*, 274 F.3d 652, 655 (2d Cir. 2001). We note that in this context the Village's mere "negative option" to replace the Board at any time is alone likely inadequate supervision, *Ticor*, 504 U.S. at 638 (noting that supervision must be "active"), and leave to the district court on remand the determination in the first instance of what degree or kind of supervision is adequate and suffices for the Board's assertion of immunity to succeed.

IV. The Village's Immunity - Redux

We now return to the question we left unanswered in Part II.C., above: whether the Village's immunity, like the Board's, depends upon a showing that the Board is actively

supervised. As we indicated, we are unaware of an opinion of the Supreme Court or of this Court that has squarely addressed this issue. We note that the Supreme Court has never held that a state's failure to supervise a regulated private party can deprive the state of immunity under *Parker*, even though such a failure can result in liability for the private party. The federalism-based concerns underlying state immunity from an antitrust action seem to us less pressing in this case than in the immunity cases the Court and we have decided, however, in part because the Village is not a sovereign, and in part because the plaintiff seeks only injunctive and declaratory relief against the Village. An injunction might be an appropriate device for blocking municipal regulatory regimes that result in significant anticompetitive action by private parties and that constitute nothing more than a "gauzy cloak of state involvement." *Midcal*, 445 U.S. at 106.

But the question of the need for an injunction will arise in this case only if the district court ultimately determines that the Board is not actively supervised and thus not immune, and that there has in fact been a violation of the antitrust laws. We therefore decline to decide this issue since it may prove unnecessary to the disposition of the case. If the district court determines on remand that supervision is lacking, that antitrust violations have occurred, and that a damages award against the Board would be inadequate to deter future harms, it may consider for the first time whether the *Parker* antitrust immunity doctrine would allow an injunction to issue against the Village even though the Village's actions were authorized by the state.

V. Caveat

It bears both repetition and emphasis that we have done no more than decide that, on the record before us, the defendants are not entitled to *Parker* state-action immunity as a matter of law. Nothing we have said should be read to

imply any views as to the plaintiff's standing under the antitrust laws to raise all of the issues with respect to which it pleads in its amended complaint or as to the possible ultimate merits of its legal claims.

CONCLUSION

For the foregoing reasons, we vacate the judgment of the district court, and remand the case for further proceedings consistent with this opinion.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th Day of March, two thousand three.

ELECTRICAL INSPECTORS, INC.,
Plaintiff-Counter-Defendant-Appellant,

v.

01-9483

VILLAGE OF EAST HILLS, VILLAGE OF ROSLYN and VILLAGE OF OYSTER BAY COVE, Defendants-Counter-Claimants,

VILLAGE OF ISLANDIA, ALEXANDER PIRNIE and NEW YORK BOARD OF FIRE UNDERWRITERS,
Defendants-Counter-Claimants-Appellees,

VILLAGE OF ISLAND PARK, VILLAGE OF BROOKVILLE, VILLAGE OF NORTH HILLS, VILLAGE OF FLOWER HILL, VILLAGE OF GREAT NECK, VILLAGE OF GREAT NECK ESTATES, VILLAGE OF KINGS POINT, VILLAGE OF PORT WASHINGTON NORTH, VILLAGE OF SEA CLIFF, VILLAGE OF SADDLE ROCK and VILLAGE OF BAITING HOLLOW, Defendants.

A petition for panel rehearing and a petition for rehearing en banc having been filed from an AMENDED opinion herein by appellees, Village of Islandia

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing be DENIED.

It is further noted that the petitions for rehearing en banc have been transmitted to the judges for the Court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE

By: /s/
Arthur Heller
Administrative Attorney

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th Day of March, two thousand three.

ELECTRICAL INSPECTORS, INC.,
Plaintiff-Counter-Defendant-Appellant,

v.

01-9483

VILLAGE OF EAST HILLS, VILLAGE OF ROSLYN and VILLAGE OF OYSTER BAY COVE, Defendants-Counter-Claimants,

VILLAGE OF ISLANDIA, ALEXANDER PIRNIE and NEW YORK BOARD OF FIRE UNDERWRITERS,
Defendants-Counter-Claimants-Appellees,

VILLAGE OF ISLAND PARK, VILLAGE OF BROOKVILLE, VILLAGE OF NORTH HILLS, VILLAGE OF FLOWER HILL, VILLAGE OF GREAT NECK, VILLAGE OF GREAT NECK ESTATES, VILLAGE OF KINGS POINT, VILLAGE OF PORT WASHINGTON NORTH, VILLAGE OF SEA CLIFF, VILLAGE OF SADDLE ROCK and VILLAGE OF BAITING HOLLOW, Defendants.

A petition for panel rehearing and a petition for rehearing en banc having been filed from an AMENDED opinion herein by appellees, New York Board of Underwriters and Alexander Pirnie

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing be DENIED.

It is further noted that the petitions for rehearing en banc have been transmitted to the judges for the Court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE

By: /s/
Arthur Heller
Administrative Attorney

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

N.Y. EXEC. L. § 371

Statement of legislative findings and purposes

1. The legislature hereby finds and declares that:

a. The present level of loss of life, injury to persons, and damage to property as a result of fire demonstrates that the people of the state have yet to receive the basic level of protection to which they are entitled in connection with the construction and maintenance of buildings;

b. There does not exist for all areas of the state a single, adequate, enforceable code establishing minimum standards for fire protection and construction, maintenance and use of materials in buildings. Instead, there exists a multiplicity of codes and requirements for various types of buildings administered at various levels of state and local government. There are, in addition, extensive areas of the state in which no code at all is in effect for the general benefit of the people of the state;

c. The present system of enforcement of fire protection and building construction codes is characterized by a lack of adequately trained personnel, as well as inconsistent qualifications for personnel who administer and enforce those codes;

d. Whether because of the absence of applicable codes, inadequate code provisions or inadequate enforcement of codes, the threat to the public health and safety posed by fire remains a real and present danger for the people of the state; and

e. The multiplicity of fire protection and building construction code requirements poses an additional problem for the people of the state since it increases the cost of doing business in the state by perpetuating multiple requirements, jurisdictional overlaps and business uncertainties, and, in

some instances, by artificially inducing high construction costs.

2. The legislature declares that it shall be the public policy of the state of New York to:

a. Immediately provide for a minimum level of protection from the hazards of fire in every part of the state;

b. Provide for the promulgation of a uniform code addressing building construction and fire prevention in order to provide a basic minimum level of protection to all people of the state from hazards of fire and inadequate building construction. In providing for such a uniform code, it is declared to be the policy of the state of New York to:

(1) reconcile the myriad existing and potentially conflicting regulations which apply to different types of buildings and occupancies;

(2) recognize that fire prevention and fire prevention codes are closely related to the adequacy of building construction codes, that the greatest portion of a building code's requirements are fire safety oriented, and that fire prevention and building construction concerns should be the subject of a single code;

(3) place public and private buildings on an equal plane with respect to fire prevention and adequacy of building construction;

(4) require new and existing buildings alike to keep pace with advances in technology concerning fire prevention and building construction, including, where appropriate, that provisions apply on a retroactive basis; and

(5) provide protection to both residential and non-residential buildings;

c. Insure that the uniform code be in full force and effect in every area of the state;

d. Encourage local governments to exercise their full powers to administer and enforce the uniform code; and

e. Provide for a uniform, statewide approach to the training and qualification of personnel engaged in the administration and enforcement of the uniform code.

N.Y. EXEC. L. § 377

New York State Uniform Fire Prevention and Building Code

1. The council shall formulate a uniform fire prevention and building code which shall take effect on the first day of January, nineteen hundred eighty- four. The council may from time to time amend particular provisions of the uniform code and shall periodically review the entire code to assure that it effectuates the purposes of this article and the specific objectives and standards hereinafter set forth. The secretary shall conduct public hearings on said uniform code and any amendment thereto. The secretary shall review such code or amendment, together with any changes incorporated by the council as a result of such hearings, to insure that it effectuates the purposes of this article. Upon being so satisfied, the secretary shall approve said code or amendment prior to its becoming effective.

2. The uniform fire prevention and building code shall:

a. provide reasonably uniform standards and requirements for construction and construction materials for public and private buildings, including factory manufactured homes, consonant with accepted standards of engineering and fire prevention practices;

b. formulate such standards and requirements, so far as may be practicable, in terms of performance objectives, so as to make adequate performance for the use intended the test of acceptability;

c. permit to the fullest extent feasible, use of modern technical methods, devices and improvements which tend to reduce the cost of construction without substantially affecting reasonable requirements for the health, safety and security of the occupants or users of buildings;

d. encourage, so far as may be practicable, the standardization of construction practices, methods, equipment, material and techniques; and

e. eliminate restrictive, obsolete, conflicting and unnecessary building regulations and requirements which tend to increase unnecessarily construction costs or retard unnecessarily the use of new materials, or provide unwarranted preferential treatment to types or classes of material or products or methods of construction.

N.Y. EXEC. L. § 381

Administration and Enforcement of the New York State Uniform Fire Prevention and Building Code

1. The secretary shall promulgate rules and regulations prescribing minimum standards for administration and enforcement of the uniform fire prevention and building code promulgated in accordance with sections three hundred seventy- seven and three hundred seventy-eight of this article. Such rules and regulations shall become effective not later than the first day of January, nineteen hundred eighty-five. The secretary shall promulgate such regulations after public hearing and after considering reaction to initial administration and enforcement of the uniform building and fire prevention code, including how local governments have organized to provide for such initial administration and enforcement. Such rules and regulations shall address the nature and quality of enforcement and shall include, but not be limited to the following:

a. frequency of inspections,

b. number and qualifications of staff, including requirements that inspectors be certified pursuant to this chapter,

c. required minimum fees for administration and enforcement,

d. adequacy of inspections,

e. adequacy of means for insuring compliance with the uniform code,

f. establishment of a procedure whereby any provision or requirement of the uniform code may be varied or modified in cases where strict compliance with such provision or requirement would entail practical difficulties or unnecessary hardship or would otherwise be unwarranted. Such procedure shall be designed to insure that any such variance or modification shall not substantially affect adversely provisions for health, safety and security, and that equally safe and proper alternatives may be prescribed. Requests for a variance shall be resolved within sixty days of the date of application unless a longer period is required for good cause shown, and

g. procedures for inspection of certain classes of buildings based upon design, construction, ownership, occupancy or use, including, but not limited to, mobile homes, factory manufactured homes and state-owned buildings.

Nothing in the rules shall require or be construed to require regular, periodic inspections of owner-occupied one and two-family dwellings provided, however that this shall not be a limitation on inspections conducted at the invitation of the owner or where conditions on the premises threaten or present a hazard to public health, safety, or welfare.

2. Except as may be provided in regulations of the secretary pursuant to subdivision one of this section, every local government shall administer and enforce the uniform fire prevention and building code on and after the first day of January, nineteen hundred eighty-four, provided, however, that a local government may enact a local law prior to the first day of July in any year providing that it will not enforce the uniform code on and after the first day of January next succeeding. In such event the county in which said local government is situated shall administer and

enforce the uniform code within such local government from and after the first day of January next succeeding the effective date of such local law, in accordance with the provisions of paragraph b of subdivision five of this section unless the county shall have enacted a local law providing that it will not enforce the uniform code within that county. In such event the secretary in the place and stead of the local government shall, directly or by contract, administer and enforce the uniform code. A local government or a county may repeal a local law which provides that it will not enforce the uniform code and shall thereafter administer and enforce the uniform code as provided above. Local governments may provide for joint administration and enforcement by agreement pursuant to article five-G of the general municipal law. Any local government may enter into agreement with the county in which such local government is situated to administer and enforce the uniform code within such local government. Local governments or counties may charge fees to defray the costs of administration and enforcement.

3. On and after the first day of July, nineteen hundred eighty-five, the secretary shall have power to investigate and conduct hearings relative to whether administration and enforcement of the uniform fire prevention and building code complies with the minimum standards promulgated pursuant to subdivision one of this section. At least ten days written notice of any such hearing shall be provided to the elective or appointive chief executive officer or, if there be none, the chairman of the legislative body of the local government or county whose administration and enforcement of the uniform code is at issue.

4. If the secretary determines that a local government has failed to administer and enforce the uniform fire prevention and building code in accordance with the minimum standards promulgated pursuant to subdivision

one of this section, the secretary shall take any of the following actions, either individually or in combination in any sequence:

a. The secretary may issue an order compelling compliance by such local government with the standards for administration and enforcement of the uniform code.

b. The secretary may ask the attorney general to institute in the name of the secretary an action or proceeding seeking appropriate legal or equitable relief to require such government to administer and enforce the uniform code.

c. the secretary may designate the county in which such local government is located to administer and enforce the uniform code in such local government. In the case of such designation, the provisions of subdivision five of this section shall apply.

d. The secretary may, in the place and stead of the local government, administer and enforce the uniform code in accordance with the minimum standards promulgated pursuant to subdivision one of this section. In such event, the provisions of subdivision five of this section shall apply.

5. Where the secretary has designated a county to administer and enforce the uniform fire prevention and building code within a local government or has assumed authority for administration and enforcement pursuant to subdivision two or paragraph d of subdivision four of this section:

a. Such local government or county government shall not administer and enforce the uniform code, and shall not

charge or collect fees for such administration and enforcement.

b. Such county shall administer and enforce the uniform code within such local government from and after the date of such designation. Such administration and enforcement shall apply the minimum standards promulgated by the secretary pursuant to subdivision one of this section. Notwithstanding any other provisions of law, such county shall have full power to administer and enforce the uniform code in accordance with such minimum standards, including the power to charge and collect fees for such administration and enforcement.

c. The secretary shall designate the local government or county government to resume administration and enforcement of the uniform code when the secretary is satisfied that such local government or county will provide such administration and enforcement in compliance with the minimum standards promulgated pursuant to subdivision one of this section.

d. The provisions of subdivisions three and four of this section shall apply to counties which have been designated to administer and enforce the uniform code in such local government.

6. The secretary shall study and from time to time make recommendations to the governor and legislature concerning:

a. Appropriate means to provide encouragement, support and inducements for local governments and counties to exercise their responsibilities pursuant to this section; and

b. Appropriate means to provide encouragement, support and inducements to facilitate compliance with the provisions of the uniform code.

19 N.Y. C.R.R. Part 429 (1981)
(withdrawn 1996)

§ 429.2 **Administration and enforcement of the State Building Construction Code**

(a) *Building permits.* (1) No person, firm, corporation, association or other organization shall commence the erection, construction, enlargement, alteration, improvement, removal, or demolition of any building or structure or any part thereof without having first obtained a building permit therefor from the clerk of the city, town, or village in which such work is to be done, except that no such permit shall be required for the performance of necessary repairs which are not of a structural nature and which do not involve violations of the State Building Construction Code.

* * * *

(b) *Inspections.* (1) To ensure that a building or structure complies with the applicable provisions of the State building Construction Code, all work for which a building permit has been issued shall be inspected for approval prior to enclosing or covering any portion thereof upon completion of each stage of construction, including, but not limited to, excavation, foundation, superstructure, electrical, plumbing, heating, and air conditioning. Every such building shall, in addition, be inspected on final completion. Inspections pursuant to this paragraph shall be a condition precedent to the issuance of certificates of occupancy.

(2) the local legislative body of a city, town, or village may by resolution, provide that such inspections be performed by:

(i) a designated officer or employee of the city, town or village who is qualified to conduct such inspections;

(ii) a designated officer or employee of another city, town, or village who is qualified to conduct such

inspections and who provides such inspection services under an agreement pursuant to article 5-G of the General Municipal Law

(iii) a person who is qualified to conduct such inspections and who performs such inspections pursuant to a contract with the city, town or village;

(iv) an employee or agent of the county who is qualified to conduct such inspections within the local government;

or

(v) a competent inspector, designated or approved by the city, town or village, whose fee shall be paid by the person, firm, corporation, association or other organization to which the building permit was issued.

Where no such resolution has been enacted, such inspection shall be performed in the manner provided in subparagraph (v) of this paragraph.

(3) The authorized inspector shall have the power to order in writing the remedying of any condition found to exist in, on, or about any building in violation of the State Building Construction Code. Such orders may be served upon the owner or his authorized agent personally or by registered mail sent to the address set forth in the application for the building permit. The local legislative body may by resolution grant such time as may be reasonably necessary for achieving compliance with such order.

(4) It shall be the responsibility of the owner, applicant or his agent to inform the appropriate inspector that the work is ready for each required inspection and to schedule such inspection.

(c) *certificates of occupancy* (1) No building or structure for

which a permit was issued shall be used or occupied until a certificate of occupancy shall have been issued by the clerk of the city, town, or village.

(2) When, after final inspection, it is shown that the proposed work has been completed in compliance with all applicable laws, rules, and regulations, the city, town, or village clerk shall issue a certificate of occupancy.

(d) *Fees*. The local legislative body may by resolution establish reasonable fees for the permits, inspections, certificates, and other requirements of this section.

(e) *Board of review*. The State Building Construction Board of Review shall have the powers and duties with respect to the State Building Construction Code provided in sections 381 and 382 of the Executive Law.

(f) *Remedies*. The provisions of sections 384-386 of the Executive Law shall be deemed to apply to this section.

§ 429.3 Administration and Enforcement of the State Building Conservation and Fire Prevention Code
(a) *Inspections*. (1) All buildings and premises to which the State Building Conservation and Fire Prevention Code applies shall be periodically inspected for compliance with the provisionsof such code, except that owner-occupied and one- and two-family dwellings shall not be subject to regular, periodic inspections; provided, however, that this shall not be a limitation on insections conducted at the invitation of the owner or where onditions on the premises threaten or present a hazard to the public, health, safety, or welfare.

(2) the local legislative body of a city, town, or village may by resolution, provide that such inspections be performed by:

(i) a designated officer or employee of the city, town or village who is qualified to conduct such inspections;

(ii) an employee or agent of another city, town, or village who is qualified to conduct such inspections and who provides such inspection services under an agreement pursuant to article 5-G of the General Municipal Law

(iii) a person who is qualified to conduct such inspections and who performs such inspections pursuant to a contract with the city, town or village;

(iv) an employee or agent of the county who is qualified to conduct such inspections within the local government;

or

(v) the chief of the fire department, fire corporation, or fire company responsible for fire protection at the place where such building or premises is located, or a member of such fire department, fire corporation, or fire company assigned by said chief to make such inspections.

Where no such resolution has been enacted, such inspection shall be performed in the manner provided in subparagraph (v) of this paragraph.

(3) The authorized inspector shall have the power to order, in writing, the remedying of any condition found to exist in, on, or about any building in violation of the State Building Conservation and Fire Prevention Code. Such orders may be served upon the owner or his authorized agent personally or by registered mail sent to the address set forth in the application for permission for construction of such building or at his actual place of business. The local legislative body may by resolution grant such time as may be reasonably necessary for achieving compliance with such order.

(b) *Board of review.* The State Building Construction Board of Review shall have the powers and duties with respect to

the State Building Conservation and Fire Prevention Code provided in sections 381 and 382 of the Executive Law.

(c) *Fees*. The local legislative body may by resolution establish reasonable fees for the permits, inspections, certificates, and other requirements of this section.

(d) *Remedies*. The provisions of sections 384-386 of the Executive Law shall be deemed to apply to this section.

§ 429.4 Local Laws and Ordinances

In lieu ofthe procedures set out in sections 429.2 and 429.4 of this Part, a local legislative body of a city, town, or village may at any time enact a local law or ordinance, consistent with the articles 18 and 18-A of the Executive Law, providing for the administration in such city, town, or village of the State Building Construction and Fire Prevention Code. Such local law or ordinance may provide for:

(a) examination, approval, and disapproval of plans or specifications;

(b) issuance and revocation of permits, licenses, certificates, and similar documents;

(c) inspections;

(d) remedying of any condition in, on, or about any building found to be in violation of the codes;

(e) designating personnel to enforce the codes;

(f) promulgation, amendment, and repeal of rules and regulations in aid of such adminstration and enforcement;

(g) collection of reasonable fees;

(h) review and, where appropriate, modification of determinations, orders, and proceedings;

(i) remedies for violations; and

(j) all things necessary or desirable to further the objectives of the State Building Construction Code, the State Building Conservation and Fire Prevention Code, and the laws and regulations pertaining thereto.